No. 1

Supreme Court, U.S.
FILED

081464 MAY 22 2009

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

EAST END PROPERTY COMPANY #1 LLC, MARK KASPIEV, JOHN MCCONNELL, JOHAN MCCONNELL, DONALD SEUBERT, PATRICIA SEUBERT, FRANCESCA HURLEY, MICHAEL HURLEY, LAURENCE EINUIS, EMILY KARLOVITS, STEPHEN HENRY, THE YAPHANK TAXPAYERS AND CIVIC, ASSOCIATION INC., and the SOUTH YAPHANK CIVIC ASSOCIATION, *et al.*,

Petitioners,

—v.—

TOWN BOARD OF THE TOWN OF BROOKHAVEN, THE TOWN OF BROOKHAVEN, and CAITHNESS LONG ISLAND, LLC, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI

RONALD J. ROSENBERG
Counsel of Record
ROBERT M. CALICA
EDWARD M. ROSS
JUDAH SERFATY
ROSENBERG CALICA & BIRNEY LLP
100 Garden City Plaza, Suite 408
Garden City, New York 11530
(516) 747-7400

Attorneys for Petitioners

QUESTIONS PRESENTED FOR REVIEW

I. Whether substantive due process is violated when a national power plant developer negotiates a $150 - $200 million dollar contribution to local programs, community organizations and constituencies designated by a cash-strapped suburban town, expressly in exchange for the Town's granting of environmental and zoning approvals to construct an oversized, regional electrical power plant in a local neighborhood where applicable zoning does not otherwise permit it.

II. Whether a Town Board's completely unlawful and *ultra vires* negotiation and acceptance of a $150 - $200 million dollar payment by a zoning applicant as a condition of environmental and zoning approvals violates the substantive due process rights of petitioners, who are nearby residents, Civic Associations, property owners and others accorded standing for purposes of the environmental review.

LISTING OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

The parties to this appeal are those listed in the caption, as well as: Long Island Power Authority and Planning Board of the Town of Brookhaven.

The parents, subsidiaries and affiliates of Petitioner East End Property Company #1 LLC are:

Dune Capital Brookhaven LLC, a Delaware limited liability company
Dune Special Investments LP
East End Investors LLC, a Delaware limited liability company
East End Junior MB #1 LLC, a Delaware limited liability company
EE Springing Member I-C, Inc., a Delaware corporation
East End Senior MB #1 LLC, a Delaware limited liability company
East End Property Company #1 LLC, a Delaware limited liability company
EE Springing Member I-B, Inc., a Delaware corporation
EE Springing Member I-A, Inc., a Delaware corporation
Panco Management of New York LLC
PP East End Manager Corp., a Delaware corporation

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW	i
LISTING OF PARTIES AND CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
RELEVANT LAWS	2
STATEMENT OF THE CASE	3
RULE 14(G)(I) STATEMENT	10
REASONS FOR GRANTING THE PETITION	11
STANDING AND PROPERTY INTEREST	18
CONCLUSION	21
APPENDIX	
February 24, 2009 Order of the State of New York Court of Appeals	1a
November 25, 2008 Order of the Appellate Division, Second Department with respect to Docket No. 2007-05041 [Index No. 23201/06]	3a

PAGE

November 25, 2008 Order of the Appellate Division, Second Department with respect to Docket No. 2007-05605 [Index No. 29596/06] 11a

November 25, 2008 Order of the Appellate Division, Second Department with respect to Docket No. 2008-00757 [Index No. 17956/07] 14a

May 22, 2007 Order of the Supreme Court, Suffolk County with respect to Index No. 29596/06 ..... 17a

May 22, 2007 Order of the Supreme Court, Suffolk County with respect to Index No. 23201/06 ..... 24a

January 8, 2008 Order of the Supreme Court, Suffolk County with respect to Index No. 17956/06 ..... 72a

TABLE OF AUTHORITIES

Cases: PAGE

A Helping Hand, LLC v. Baltimore County, MD, 515 F.3d 356 (4th Cir. 2008)..... 16

ASARCO Inc. v. Kadish, 490 U.S. 605, 109 S.Ct. 2037 (1989)..... 19

Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701 (1972)..... 20

Braniff Airways v. Nebraska State Bd. of Equalization and Assessment, 347 U.S. 590, 74 S.Ct. 757 (1954)..... 11

Church v. Town of Islip, 8 N.Y.2d 254, 203 N.Y.S.2d 866 (1960)..... 12

Cine SK8, Inc. v. Town of Henrietta, 507 F.3d 778 (2d Cir. 2007)..... 12, 17

Citizens to Save Minnewaska v. New Paltz Central School District, 95 A.D.2d 532, 468 N.Y.S.2d 920 (3d Dept. 1983)..... 6, 13

City of Cuyahoga Falls, Ohio v. Buckeye Community Hope Foundation, 538 U.S. 188, 123 S.Ct. 1389 (2003)..... 10, 11

County of Sacramento v. Lewis, 523 U.S. 833, 118 S.Ct. 1708 (1998)..... 11

Crown Point Dev., Inc. v. City of Sun Valley, 506 F.3d 851 (9th Cir. 2007)..... 16

Daniels v. Williams, 474 U.S. 327, 106 S.Ct. 662 (1986)..... 17

PAGE

East End Property Co. No. 1, LLC v. Kessel, 46 A.D.3d 817, 851 N.Y.S.2d 565 (2d Dept 2007) 2, 9, 19

Fleck v. Town of Colden, 16 A.D.3d 1052, 792 N.Y.S.2d 281 (4th Dept. 2005) 6

Hurtado v. California, 110 U.S. 516, 4 S.Ct. 111 (1884) 17

Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 125 S.Ct. 2074 (2005) 16

Nollan v. California Coastal Comm'n, 483 U.S. 825, 107 S.Ct. 3141 (1987)..... 15, 16

Nunziato v. Planning Bd. of Borough of Edgewater, 225 N.J.Super. 124, 541 A.2d 1105 (N.J.Super. A.D., 1988)..... 12, 13, 15, 17

Palm Management Corp. v. Goldstein, 29 A.D.3d 801, 815 N.Y.S.2d 670 (2d Dept. 2006) 6

Rose Acre Farms, Inc. v. U.S., 559 F.3d 1260 (Fed. Cir. 2009) 16

Society of Plastics Industry, Inc. v. County of Suffolk, 77 N.Y.2d 761, 570 N.Y.S.2d 778 (1991) 9, 19

Toll Bros., Inc. v. Board of Chosen Freeholders of County of Burlington, 194 N.J. 223, 944 A.2d 1 (N.J., 2008) 12, 14

PAGE

Township of Marlboro v. Planning Bd. of Tp. of Holmdel, 279 N.J.Super. 638, 653 A.2d 1183 (N.J. Super. A.D., 1995) 12, 13, 15

Wilkerson v. Johnson, 699 F.2d 325 (6th Cir.1983) 17

Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974). 17

Statutes:

28 U.S.C. § 1257 2

U.S. CONST. ARTICLE III, § 2..... 2

U.S. CONST. AMEND., XIV, § 1.....*passim*

Other Authorities:

187 NEW JERSEY LAW JOURNAL 1152, Smart Bargaining or Illegal Exactions? Developers Seeking Approval Cannot Pay for Things the Statutes Don't Permit (2007) 12, 14

OPINIONS BELOW

On May 22, 2007, the New York Supreme Court, Suffolk County granted in part and denied in part petitioner's petition seeking invalidation of Town Board approvals allowing construction of a large electric generation facility (Appendix 24a). The order required the Town Board to explain its reasons for changing its vote from disapproval of a required environmental finding, to approval. The same day, the same court issued a related order in a related proceeding, deeming the proceeding governed by the first order and otherwise denying the petition (Appendix 17a). After the Town Board purported to explain its change of vote, the Supreme Court, Suffolk County, issued a third order in a third proceeding involving the same parties, dated January 8, 2008, dismissing the petition (Appendix 72a). Timely appeals from each of the three orders were taken.

By order of the New York Appellate Division, Second Department, the three appeals were consolidated for purposes of oral argument and the Record on Appeal. On November 25, 2008, through three decisions and orders, the Appellate Division affirmed the dismissal of the petitions, and granted the Town Board and the applicant's cross-appeals reversing the lower court's May 22, 2007 ruling requiring the Town Board to provide an explanation for its change of vote (Appendix 3a; 11a; 14a). The New York Appellate Division's rulings subject to this appeal are published at 56 A.D.3d 773, 868 N.Y.S.2d 264; 56 A.D.3d 773, 867 N.Y.S.2d 685; and 56 A.D.3d 778, 867 N.Y.S.2d 686.[1]

---

[1] The rulings subject to this appeal make reference to a prior "Nassau County Action". That prior action is published at

On February 24, 2009 the New York Court of Appeals denied, in one combined order, the timely application of petitioners seeking leave to appeal all three orders of the Appellate Division (Appendix 1a). This petition for a writ of certiorari pertaining to all three proceedings, is accordingly similarly combined by virtue of the New York Court of Appeals' single order thereon.

JURISDICTION

The New York Court of Appeals denied petitioners leave to appeal on February 24, 2009 (Appendix 1a). This petition is therefore timely. The basis of jurisdiction is 28 U.S.C. § 1257, and Article III, § 2 of the U.S. Constitution.

RELEVANT LAWS

U.S. CONST. AMEND., XIV, § 1

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

East End Property Co. No. 1, LLC v. Kessel, 46 A.D.3d 817, 851 N.Y.S.2d 565 (2d Dept 2007), with the trial court's unpublished order therein available on Westlaw at 2006 WL 6200914 (Trial Order) (N.Y.Sup. Mar 27, 2006).

STATEMENT OF THE CASE

Respondent Caithness Long Island, LLC ("Caithness"), a national power plant developer, approached a cash-strapped suburban town (respondent Brookhaven) offering to contribute at least $150 million (ultimately nearly $200 million) in direct exchange for obtaining the Town's permission to construct a vastly oversized, regional electrical power plant in an area of the Town where local zoning does not permit it. In direct exchange for contributing between $150 million - $200 million to various favored constituencies of the Town Board members who voted upon the approvals (a local community center for one Board Member's district, libraries, aid and scholarships to local school districts, and the like), Caithness obtained the Town's permission to construct a 350 megawatt, dual powered (gas and oil) electrical generating facility (the "Caithness Plant").

This permission was obtained notwithstanding that the Caithness Plant includes a 170 foot exhaust stack where only 120 feet is permitted, an 85 foot building height despite a 50 foot height limit (i.e., a structural volume some *3* times greater than local zoning permits), and a quasi-judicial adjudication was rendered by the Town Board members that the Caithness Plant would not have a significant adverse environmental or zoning impact upon other adjacent and local property owners and residents, but *only* upon the express "condition", set forth in the approvals themselves, that Caithness pay over $150 million into a town-wide "Community Benefits Package" consisting of local community centers, local school aid, scholarships, etc. having nothing whatsoever to do with the local environmental or zoning impacts of the Caithness Plant.

If that alone were not enough, the Town Board initially voted to *deny* approvals to Caithness. However, *after* Caithness "sweetened the pot" by several million additional dollars (including a $1 million community center in the local district of one Board Member who thereupon switched his vote from disapproval to approval), the Town Board promptly reversed itself and authorized construction of the Caithness Plant.[2]

The legal challenges to this abjectly unlawful and unconstitutional arrangement by Petitioner East End Property LLC ("East End"), which owns a nearby 795-unit residential rental community occupied by 2,000 persons known as "Atlantic Point", the resident manager of Atlantic Point, and two respected local Civic Associations and their officers (who are also nearby community residents) [collectively, "Petitioners"] were simply swept away by New York courts below which wrongly concluded that while Petitioners possess actual "standing" and injury-in-fact to object to the environmental review approvals, that standing and actual injury somehow do not extend to their objection to the illegal inducements giving rise to those determinations,

---

[2] One Town Board Member conceded, on the *record*, that "*they [Caithness and LIPA] came to me and indicated to me what they were prepared to add to the package because of my unhappiness*", and that in response, he cynically bargained with Caithness to obtain "*more benefits . . . com[ing] to my district*" before *changing* his vote from one of *disapproval* on the first vote, to one of *approval* on the second (JR. 3516-3519). He was subsequently quoted in a local newspaper boasting to his constituents that "***I did not consider voting for Caithness until I got $1 million for Medford*** *[an area in his district]*".

and could also not challenge the special permit approvals themselves.[3]

No court (State or Federal) has ever sanctioned such a shockingly illegal arrangement and corruption of public processes in the complete absence of authority. To the contrary, every court (including other New York courts and the courts of numerous other States) which has considered the issue has rightly concluded that due process is violated when a wealthy developer is permitted, quite literally, to "purchase" otherwise unauthorized commercial development rights and municipal approvals in exchange for paying massive sums of money to the favored constituencies of local officials who are required to vote upon such development approvals and who have no authority to accept such payments.

If left to stand, the destructive precedent of the New York courts will invite corruption of local land use processes in a manner which the U.S. Constitution clearly forbids.

This petition for a writ of certiorari to review the New York courts' dismissal of Petitioners' claims should therefore be granted.

In New York, local municipalities possess no inherent zoning authority beyond that given them by the state legislature, and they possess no authority to negotiate with a zoning applicant for the payment of a sum of money to constituencies having nothing

---

[3] The Final Environmental Impact Statement ("FEIS") for the Caithness Plant *specifically identified* the Atlantic Point residential community owned by East End Property Co. #1 as the "visual receptor" of the oversized 170 foot exhaust stack, depicting the proposed appearance of the 170 foot high exhaust stack directly from the gatehouse of Atlantic Point (JR. 529, 535, 541).

to do with the subject special permit application. *Citizens to Save Minnewaska v. New Paltz Central School District*, 95 A.D.2d 532, 468 N.Y.S.2d 920 (3d Dept. 1983). Additionally, whether the body is a zoning board or a town board (the town's legislature), a determination to grant a special permit is a quasi-judicial act.[4] Undeterred, the Town Board here acquiesced in the plot apparently initiated by the applicant Caithness, i.e. (i) that enormous sums of money would be given, (ii) the Town Board of a cash-starved suburban town would be able to fund popular local projects, and (iii) the special permit for an oversized, regional power plan would be approved.

When the Town Board initially considered the Caithness application for environmental and zoning approvals on June 6, 2006, a proposed Resolution to "condition" the approval upon Caithness' paying $150 million to constituencies designated by the Town Board members failed. By a vote of 4-3, the Town Board on June 6, 2006 refused to accept a "findings statement", mandated under New York's environmental review statute (SEQRA), certifying that the environmental impacts of the proposed oversized power plant had been mitigated to the maximum extent possible. But the illegal financial inducement negotiations continued, with the payment increased by the applicant, ultimately leading the Town Board to reverse itself a few weeks later on July 25, 2006, to approve the SEQRA findings

---

[4] *Fleck v. Town of Colden*, 16 A.D.3d 1052, 792 N.Y.S.2d 281 (4th Dept. 2005) (Town Board deciding variance application acts as Zoning Board of Appeals and is subject to limitation imposed on ZBA); *Palm Management Corp. v. Goldstein*, 29 A.D.3d 801, 815 N.Y.S.2d 670 (2d Dept. 2006) (ZBA is a quasi-judicial administrative agency).

statement, and at the same time, approve the special permit. The special permit approval, however, specifically made the $150 - $200 million payment by the zoning applicant an express "condition" of the Town Board's approval.

Town Board Councilman Timothy Mazzei, the member who changed his vote between June 6th and July 25th, made clear on the record in a Town Board meeting during that period, that he was negotiating the amount of the payment with the applicant. His full statement on the record reads:

> "*I indicated very early on that one Council person, not six, negotiated this, this benefit package with LIPA [respondent Long Island Power Authority] and Caithness. That bothered me. It still bothers me.* I didn't think it was right. *When it was clear that you didn't have the votes, well, then all of a sudden, they became important because a vote was needed.* They came to me very professionally, very intelligently. I spoke with Ross [Ain] who is an extremely nice man, extremely intelligent man. He has explained everything very well to me. And, that with LIPA representatives, also very professional, very intelligent. And, I indicated to them that I wasn't going [to] negotiate. That was my exact words. *I said I wasn't happy. I felt that more benefits should have come to my district because . . . to do that and I'll listen and I'll take into consideration.*' But, I never said, '*I'm negotiating with you.*' *I never said, 'I want this, this, and the other thing'. They came to me and said, we're prepared to do*

> *additional things to try to satisfy you and I, and I listened to them.*" (see Transcript of June 15, 2006 Town Board work session at 40-42, exhibit YYY to Return in prior action) [emphasis supplied].

The Town's Supervisor (the Presiding member of the Town Board) also made clear on the record that the Town's approval was directly motivated by obtaining otherwise unavailable funds for popular community projects:

> "*Between the pilot [payment in lieu of taxes] payments between and community benefits package that was very ably negotiated by Councilwoman Kepert, Councilman Mazzei, Councilwoman Walsh and all the Town Board, we're able to do things with this particular power plant proposal that will enable communities who otherwise would never have been able to meet their public mission, whether it's the Village of Patchogue, the village of Bellport or this township or Brookhaven, whether it's the Boys & Girls Club Of North Bellport, whether it's the South Country School District. The list goes on and on as to how this is going to benefit a whole multitude of peoples, a whole multitude of public organizations. And this is the opportunity that, yes, we seek because it gives us the ability to do things what otherwise would not be done." (Appeal No. 3 Record 180-181).*"

The petitioners challenged the Town Board's (and the subsequent Town Planning Board's) resolution in

a state court proceeding. Because the same petitioners had, in a prior lawsuit, been found to live and own property in sufficiently close proximity to the proposed power plant to have "injury-in-fact",[5] petitioners were ruled to have "standing" to complain about the environmental impacts that the power plant would have on them (Appendix 45a; 51a-57a). Nevertheless, and for inexplicable logic or reason (other than to avoid having to confront the abject illegality of the large monetary payoff), the court ruled that notwithstanding petitioners' injury-in-fact environmentally, petitioners have no standing to object to the special permit (Appendix 43a-44a, 88a-89a[6]). The court further ruled that because the monetary inducement was a condition of the special permit, petitioners have no standing to object to the illegal payoff, even though the inducement led to, and was accepted at the same time as, the environmental and zoning approvals. The court so ruled,

---

[5] The prior lawsuit is published at *East End Property Co. No. 1, LLC v. Kessel*, 46 A.D.3d 817, 851 N.Y.S.2d 565 (2d Dept 2007), with the trial court's unpublished order therein available on Westlaw at 2006 WL 6200914 (Trial Order) (N.Y.Sup. Mar 27, 2006).

[6] SEQRA standing is no different than general zoning standing, and all zoning determinations must include and be made in consideration of environmental concerns (*Society of Plastics Industry, Inc. v. County of Suffolk*, 77 N.Y.2d 761, 770 771, 570 N.Y.S.2d 778 (1991). In the prior lawsuit, which was given res judicata effect in this lawsuit (Appendix 45a), all the petitioners other than the Civic Associations were found to live or have property close enough to the proposed electric generation facility to have standing, and on appeal, the Appellate Division therein ruled that the Civic Associations too have such standing. *East End Property Co. No. 1, LLC v. Kessel*, 46 A.D.3d 817, 851 N.Y.S.2d 565 (2d Dept 2007), with the trial court's unpublished order therein available on Westlaw at 2006 WL 6200914 (Trial Order) (N.Y.Sup. Mar 27, 2006).

even though the Town Board's change of its vote upon the environmental findings statement from against approving it on June 6th to approving it on July 15, 2006, was expressly conditioned upon increasing the sum of money to be paid.

RULE 14(g)(i) STATEMENT

A substantive due process violation is stated upon a showing of an "arbitrary" deprivation of a liberty or property interest, if its arbitrariness is "egregious". *City of Cuyahoga Falls, Ohio v. Buckeye Community Hope Foundation*, 538 U.S. 188, 198, 123 S.Ct. 1389, 1396 (2003). The petition below was premised on the Town Board's conduct in illegally accepting the payment of money as being blatantly "arbitrary" and "*ultra vires*" (Combined Petition and Complaint [first proceeding], ¶¶47, 50). The due process claims of Petitioners were included into the petition by incorporation (*id.*, ¶46 ["For reasons more fully detailed in the accompanying memorandum of law (incorporated herein), the changed Town Board vote violated, *inter alia*, . . . applicable procedures of the Town Board, and was otherwise the result of unlawful and impermissible 'contract zoning', and the Resolutions were without authority and jurisdiction were otherwise unlawful, arbitrary and capricious").

The incorporated accompanying memorandum of law argued extensively that the "change in vote was based upon such *ex parte* communications with Caithness and financial 'negotiations' with Caithness for increases in the Community Benefits Package. . . . It is beyond cavil that it is unlawful for the Town Board to accord any weight to those *ex parte* discussions, submissions and site visits in the votes

occurring after June 6, 2006, as this would directly deprive petitioners of their due process rights" (Petitioner's June 12, 2007 Memo of Law in Support of Petition, pp. 36-37 [additionally quoting caselaw holding " '[p]etitioner's due process rights were violated by the board's ex parte receipt and consideration' " of additional information and material).

Additionally, even when "inexplicit, . . . the due process issue [was] within the clear intendment of such contention and [ ] such issue [was] sufficiently presented." *Braniff Airways v. Nebraska State Bd. of Equalization and Assessment*, 347 U.S. 590, 74 S.Ct. 757 (1954).

REASONS FOR GRANTING THE PETITION

By accepting the payment of $150 - $200 million as an inducement and express "condition" of its special permit approval, and by agreeing to the power plant applicant's offers to make the payoffs to whichever local programs, community groups, civic associations and Town constituencies the Town Board members decided to favor, the Town Board acted in a shockingly arbitrary manner, completely outside of its authority, without any statute or grant of power permitting it, and in the complete absence of standards and limitations on its bargaining. It thereby violated the substantive due process rights of petitioners. The substantive due process standard of review, looking to whether the conduct was arbitrary, and so "arbitrary" as to be "egregious" *(City of Cuyahoga Falls, Ohio v. Buckeye Community Hope Foundation*, 538 U.S. 188, 198, 123 S.Ct. 1389, 1396 [2003] [citing *County of Sacramento v. Lewis*, 523 U.S. 833, 846, 118 S.Ct. 1708 [1998]), while a necessarily difficult standard, is satisfied here. The Town

Board's conduct was "tainted with . . . fundamental procedural irregularity" such that it plainly rose from being merely arbitrary to being egregiously so. *Cine SK8, Inc. v. Town of Henrietta*, 507 F.3d 778 (2d Cir. 2007).

New Jersey courts (and even another New York appellate court)[7] have consistently recognized the egregious mischief, lawlessness, opportunity for abuse, and shocking unacceptability of a local zoning board, on an *ad hoc* basis and without any statute allowing for it or regulating its parameters, accepting and bargaining for a zoning permit applicant's payment of money or other consideration as an inducement. *Toll Bros., Inc. v. Board of Chosen Freeholders of County of Burlington*, 194 N.J. 223, 944 A.2d 1 (N.J., 2008); *Township of Marlboro v. Planning Bd. of Tp. of Holmdel*, 279 N.J.Super. 638, 653 A.2d 1183 (N.J. Super. A.D., 1995); *Nunziato v. Planning Bd. of Borough of Edgewater*, 225 N.J.Super. 124, 541 A.2d 1105 (N.J.Super. A.D., 1988); *see* 187 NEW JERSEY LAW JOURNAL 1152, *Smart Bargaining or Illegal Exactions? Developers Seeking Approval Cannot Pay for Things the Statutes Don't Permit* (2007). At least one New York court, however, has determined that a supposed "payment in lieu of taxes" (PILOT) agreement with a municipal zoning entity having no jurisdiction or authority to enter such agreements, is manifestly unlawful and

---

[7] See, *Citizens to Save Minnewaska v. New Paltz Central School District*, 95 A.D.2d 532, 468 N.Y.S.2d 920 (3d Dept. 1983) invalidating the school districts grant of a tax exemption to Marriott Corporation conditioned upon the applicant making monetary payments to the district in the event casino gambling was legalized at the site, holding that "*a Legislature cannot bargain away or sell its powers*" (quoting *Church v. Town of Islip*, 8 N.Y.2d 254, 203 N.Y.S.2d 866 [1960]).

requires invalidation of the zoning approvals to which the payment led. *See also Citizens to Save Minnewaska v. New Paltz Central School District*, 95 A.D.2d 532, 468 N.Y.S.2d 920 (3d Dept. 1983) (school district's resolution granting applicant tax exemption conditioned on applicant paying PILOT payment in the event casino gambling were legalized, was *ultra vires*).

In fact, in denouncing such arrangements as altogether unlawful, New Jersey courts in particular have aptly described them with the most abject contempt, clearly showing them to amount to "arbitrary" conduct egregious enough to constitute a substantive due process violation:

> [Such an] illegal exaction constitutes a blatant *quid pro quo* for the approval, either demanded by the municipality and acceded to by the developer or offered by the developer and accepted by the municipality in circumstances in which the exaction is unrelated to any legitimate land use concerns generated by the development application itself and the amount thereof is entirely arbitrary. If that is so, then the transaction may be fairly regarded as an interdicted sale of a municipal approval, subversive of law, anathematic to public policy, and remedial only by vitiation of the approval.

Township of Marlboro v. Planning Bd. of Tp. of Holmdel, 279 N.J.Super. 638, 653 A.2d 1183 (N.J. Super. A.D., 1995).

And in an earlier case, the court in *Nunziato v. Planning Bd. of Borough of Edgewater*, 225

N.J.Super. 124, 541 A.2d 1105 (N.J.Super. A.D., 1988), directly refused to accept a claim of an applicant who offered the money inducement, or of the municipal board members who accepted it, that their judgments were not corrupted by the payments such as to render them arbitrary and capricious. The New Jersey Appellate Division held that "[w]ithout legislated standards the possibilities for abuse in such negotiations between an applicant and a regulatory body, no matter how worthy the cause, are unlimited." It ruled that the "the kind of free-wheeling bidding under review is *grossly inimical* to the goals of sound land use regulation" and constitutes an "*intolerable spectacle* of a planning board haggling with an applicant over money [such as to] too strongly suggests that variances are up for sale."

Moreover, commentators have decried payoff arrangements made without a statutory framework or limitation, as being little more than an unlawful ad hoc bribe to the municipality made in exchange for zoning approvals. 187 NEW JERSEY LAW JOURNAL 1152, *Smart Bargaining or Illegal Exactions? Developers Seeking Approval Cannot Pay for Things the Statutes Don't Permit* (2007) (deriding such payoffs in exchange for permit approvals as "appalling"and altogether unlawful).

Just last year the New Jersey Supreme Court in *Toll Bros., Inc. v. Board of Chosen Freeholders of County of Burlington*, 194 N.J. 223, 944 A.2d 1 (N.J., 2008), endorsed and approved the holdings of these cases deriding such quid pro quo agreements as unlawful.[8]

---

[8] The New Jersey Supreme Court held that when the complaining party is the applicant who engaged in the negotiations and bargaining with the zoning board (as opposed to members of

The court explained:

> Indeed, it is hard to explain why a private developer would offer more than its fair share contribution without a quid pro quo. In addition to the problem of compulsion, so-called voluntary contributions are not much different than a pay-to-play system, where developers are rewarded for their philanthropic gifts. Allowing such a scheme not only impacts the developers willing to pay, but threatens the livelihood of those unable or unwilling to submit to the illicit exaction toll. Michael H. Crew, *Development Agreements After Nollan v. California Coastal Commission*, 22 Urb. Law. 23, 54-55 (1990) (Permitting these excess exactions would in effect allow sale of development rights to those who are able to pay the asking price. . . . It would be fair to assume that . . . [the] zeal to increase revenue would result in inattention to more appropriate planning concerns).

The appropriateness of this Court now confronting the abject illegality under the substantive Due Process Clause of a developer's large monetary inducement to a local zoning board in the complete absence of jurisdiction to negotiate or accept such

---

the public aggrieved by the illegal wheeling and dealing, as in the *Township of Marlboro* and *Nunziato* cases which the court extensively cited and quoted), the bargain struck will not be binding and is subject to continual redress and renegotiation whenever a circumstance changes. The court held that if it were otherwise, and such an agreement were deemed an enforceable contract, having no relation to the supposed reasons upon which it was reached, the result would be abjectly illegal and abhorrent.

payoffs, is made clear by this Court's fairly recent holding in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 125 S.Ct. 2074 (2005). There, this Court made clear that the proper constitutional framework for determining whether a zoning condition is sufficiently "related" to the zoning approval sought is not the Fifth Amendment Takings Clause, it is the Fourteenth Amendment's substantive Due Process Clause. Prior to *Lingle*, this Court in such cases as *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834, 107 S.Ct. 3141 (1987), had directed that a condition of zoning and its "relation" to the permit sought should be analyzed under the Takings Clause, a rule which effectively foreclosed most land-use substantive due process claims—most particularly those, like here, asserted by a *contestant* of the zoning application who objected not that the exaction was too onerous but that the sum or exaction offered and given is an unconstitutional corruption of the resultant decision and an unfair influence.

After *Lingle*, several Circuit Courts of Appeal have ruled that land-use based substantive due process claims, asserting that determinations were egregiously arbitrary, are no longer excluded from federal review on the formerly held notion that only the Fifth Amendment provides a "textual source" for redress of such claims. *Crown Point Dev., Inc. v. City of Sun Valley*, 506 F.3d 851, 855 (9th Cir. 2007) (*Lingle* thus "pulls the rug out" from an argument that takings claims "preclud[e] substantive due process [property] claims based on arbitrary or unreasonable conduct"); *see also*, *A Helping Hand, LLC v. Baltimore County, MD*, 515 F.3d 356, 369 (4th Cir. 2008); *see additionally Rose Acre Farms, Inc. v. U.S.*, 559 F.3d 1260, 1277 (Fed.Cir. 2009).

"The touchstone of due process is protection of the individual against arbitrary action of government." *Wolff v. McDonnell*, 418 U.S. 539, 558, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974). "[T]he Due Process Clause, like its forebear in the Magna Carta, was 'intended to secure the individual from the arbitrary exercise of the powers of government.'" *Daniels v. Williams* 474 U.S. 327, 331, 106 S.Ct. 662, 665 (1986) (quoting *Hurtado v. California*, 110 U.S. 516, 527, 4 S.Ct. 111, 116, 28 L.Ed. 232 [1884]) (internal citation omitted).

Bribery, or something close to it in the context of municipal decision-making, with large amounts of corrupting money flowing to the local municipality without the benefit of a state enabling legislation or even jurisdiction to negotiate or accept the sum, let alone defined guidelines equally applicable to all citizens and requiring that the money paid actually have a sufficient connection to the permit decision being made, is intolerable and abhorrent to substantive due process. As the New Jersey court in *Nunziato* poignantly held, this is so even when the local board members, and the applicant with whom they colluded for the negotiated money inducement, inevitably proclaim that the large dollar sums paid somehow did not invade their decision-making prerogative. *See also Cine SK8, Inc. v. Town of Henrietta*, 507 F.3d 778 (2d Cir. 2007) (zoning determination "tainted with . . . fundamental procedural irregularity" amounts to substantive due process deprivation); *Wilkerson v. Johnson*, 699 F.2d 325, 328 (6th Cir.1983) (members of a state barber licensing board denied the plaintiff due process in refusing a license to a potential competitor of one board member; "The regular and impartial administration of public rules governing [liberty and prop-

erty] interests, as required by due process, prohibits the subtle distortions or prejudice and bias" even where no class-based or other generalized invidious discrimination motivates the adverse treatment of a particular applicant).

STANDING AND PROPERTY INTEREST

An immense (a fifteen acre "footprint" on a 95-acre site) regional power plant was proposed to be erected (and subsequently approved) in a local area. Local residents, civic groups, taxpayer associations, and the owner and residents of a nearby rental residential community promptly and timely objected that the power plant and its overly large (170 foot) exhaust stack, and its noxious emissions should not be allowed, particularly when the oversized exhaust stack (170 feet), viewable from their properties and plainly directly within reach of the noxious emissions, is not allowed in the applicable zoning district and required special variances. At every juncture, from the first proceeding and through the appeals herein, petitioners *were*, in fact, found to have been "injured-in-fact" by the Town Board's resolution and to have standing, at least in part, to petition for redress (Appendix 45a; 51a-57a).

The standing which the New York court acknowledged exists is based on New York's environmental review statute, that petitioners possess environmental injury different than others *and* live sufficiently close to the project area (Appendix 45a;[9]

[9] There, the court gave res judicata effect to the ruling in the prior action deeming petitioners to reside and own property close enough to the proposed power generation facility to be effected by its adverse environmental effects, *East End Prop-*

51a-57a). Yet, the petitioners' standing and interest in the matter and the manner in which it was resolved, i.e. corrupted by a $150 million - $200 million dollar payoff, was inexplicably deemed by the New York courts not to extend to challenging the inducements themselves, or to the special permit of which the inducements were an express condition (Appendix 43a-44a, 88a-89a). In addition, the New York courts below ignored the fact, continually pointed out by petitioners, that their acknowledged standing to challenge the environmental determinations and approvals plainly gave them standing to challenge the monetary inducement corrupting the environmental approvals given after those inducements were negotiated and accepted. In fact, the monetary inducement was accepted and was made an express "condition" of the special permit approval on the same day and at the same time that the environmental approvals were rendered by the same zoning body.

Petitioners possess Article III standing in this Court because they have injury-in-fact and were accorded standing and found to possess such injury-in-fact environmental standing by the New York courts. *ASARCO Inc. v. Kadish*, 490 U.S. 605, 109 S.Ct. 2037 (1989); *see Society of Plastics Industry, Inc. v. County of Suffolk*, 77 N.Y.2d 761, 770-771, 570 N.Y.S.2d 778 (1991) (concluding that New York's environmental review law, the SEQRA statute, does not contain a special, more open grant of standing than is applicable to all other civil cases: "*SEQRA contains no provision regarding judicial review.*

---

erty Co. No. 1, LLC v. Kessel, 46 A.D.3d 817, 851 N.Y.S.2d 565 (2d Dept 2007), with the trial court's unpublished order therein available on Westlaw at 2006 WL 6200914 (Trial Order) (N.Y.Sup. Mar 27, 2006).

In contrast, other states' environmental statutes explicitly grant standing to 'any person' or 'any citizen' to enforce its provisions. . . . In the absence of an answer in the statute, we turn to the case law on standing" and apply the usual "*injury-in-fact*" and "*zone of interest*" test).

Petitioners' substantive property interests are similar: they have a property interest in their own real estate, and its environment, and a property interest under New York law as injured-in-fact entities and persons authorized to challenge the municipal resolutions. *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709 (1972) (property interests are derived from, among other things, state law). Even before the corrupting effect of the already large monetary inducement was exacerbated by an even larger payment and a reallocation of the payment to the constituencies favored by one of the holdout Town Board members, the Town Board here voted on June 6, 2006 *against* approving the environmental SEQRA resolution, thereby giving petitioners a further claim of "entitlement".[10]

Review by this Court is fully warranted.

[10] With the "negotiations" over the sum of money to be paid by the applicant having continued over the ensuing weeks, and the sum increased, the Town Board reversed itself and on July 25, 2006 granted the environmental approval and the special permit.

CONCLUSION

It is respectfully requested that this Court grant the petition.

RONALD J. ROSENBERG
Counsel of Record
ROBERT M. CALICA
EDWARD M. ROSS
JUDAH SERFATY
ROSENBERG CALICA & BIRNEY LLP
100 Garden City Plaza, Suite 408
Garden City, New York 11530
(516) 747-7400

Attorneys for Petitioners

APPENDIX

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-fourth day of February, 2009

Present, HON. JONATHAN LIPPMAN, *Chief Judge, presiding.*

Mo. No. 33

IN THE MATTER OF EAST END PROPERTY COMPANY #1, LLC, *et al.*,

Appellants,

—v.—

TOWN BOARD OF TOWN OF BROOKHAVEN, *et al.*,

Respondents;

LONG ISLAND POWER AUTHORITY,

Respondent.

(And Two Other Proceedings.)

A motion for leave to appeal to the Court of Appeals in the above causes having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

/S/ STUART M. COHEN
Stuart M. Cohen
Clerk of the Court

SUPREME COURT OF THE
STATE OF NEW YORK

APPELLATE DIVISION : SECOND JUDICIAL
DEPARTMENT

PETER B. SKELOS, J.P.
ROBERT A. LIFSON
FRED T. SANTUCCI
EDWARD D. CARNI, JJ.

Decided on November 25, 2008
2007-05041
(Index No. 23201/06)

IN THE MATTER OF EAST END PROPERTY
COMPANY #1, LLC, *et al.*,

respondents-appellants,

—v—

TOWN BOARD OF TOWN OF BROOKHAVEN, *et al.*,

appellants-respondents;

LONG ISLAND POWER AUTHORITY,

additional respondent.

Devitt Spellman Barrett, LLP, Smithtown, N.Y. (John M. Denby and Jeltje DeJong of counsel), for appellants-respondents Town Board of Town of Brookhaven and Town of Brookhaven. Westerman Ball Ederer Miller & Sharfstein, LLP, Mineola, N.Y. (Jeffrey A. Miller and Richard Gabriele of counsel), and Beveridge & Diamond, New York, N.Y. (Stephen L. Gordon and Michael Murphy of counsel), for appellant-respondent Caithness Long Island, LLC (one brief filed).

Rosenberg Calica & Birney LLP, Garden City, N.Y. (Robert M. Calica and Judah Serfaty of counsel), for respondents-appellants.

Carter Ledyard & Milburn LLP, New York, N.Y. (Christine A. Fazio, Stephen L. Kass, and Christopher Rizzo of counsel), for additional respondent Long Island Power Authority.

DECISION & ORDER

In a proceeding pursuant to CPLR article 78 to review two determinations of the Town Board of Town of Brookhaven, both dated July 25, 2006, which adopted a findings statement pursuant to the State Environmental Quality Review Act (ECL article 8) and granted the application of Caithness Long Island, LLC, for a special permit, waiver, and area variances regarding the construction of a 350-megawatt dual-fuel, combined cycle combustion turbine electric power generator, the Town Board of Town of Brookhaven and Town of Brookhaven appeal, and Caithness Long Island, LLC, separately appeals, as limited by their respective briefs, from

so much of an order and judgment (one paper) of the Supreme Court, Suffolk County (Spinner, J.), dated May 22, 2007, as granted those branches of the petition which were to annul the determinations on the grounds asserted in the fifth and sixth causes of action and to permanently enjoin the Town Board of Town of Brookhaven and Town of Brookhaven from approving the construction of the generator pursuant to the sixth cause of action, and the petitioners cross-appeal, as limited by their brief, from so much of the same judgment as denied those branches of the petition which were to annul the determinations on the grounds asserted in the first, second, third, and fourth causes of action and dismissed that portion of the proceeding.

ORDERED that the order and judgment is modified, on the law, by deleting the provision thereof granting those branches of the petition which were to annul the determinations dated July 25, 2006, on the grounds asserted in the fifth and sixth causes of action and to permanently enjoin the Town Board of Town of Brookhaven and Town of Brookhaven from approving the construction of the generator pursuant to the sixth cause of action, and substituting therefor a provision denying those branches of the petition and dismissing the proceeding; as so modified, the order and judgment is affirmed insofar as appealed from and cross-appealed from, with one bill of costs to the appellants-respondents and the additional respondent appearing separately and filing separate briefs.

This case concerns the construction of a 350-megawatt dual-fuel, combined cycle combustion turbine electric power generator in the Town of Brookhaven (hereinafter the project). In a prior

hybrid proceeding and action commenced by the petitioners, the Supreme Court, Nassau County, inter alia, found that the Long Island Power Authority (hereinafter LIPA), as lead agency, had satisfied its obligations under the State Environmental Quality Review Act (ECL art 8, hereinafter SEQRA) by taking a "hard look" at the potential environmental impacts of the project in a final environmental impact statement (hereinafter FEIS). In an order and judgment (one paper) entered August 25, 2006, the Supreme Court, among other things, in effect, dismissed the proceeding, and this Court affirmed that determination *(see Matter of East End Prop. Co. #1, LLC v Kessel*, 46 AD3d 817).

The developer, Caithness Long Island, LLC (hereinafter Caithness), thereafter applied to the Town Board of Town of Brookhaven (hereinafter the Town Board) for a special permit to build the project, and for a waiver and area variances regarding the height of the project. At a meeting of the Town Board on June 6, 2006, following public hearings and comments, a motion to approve a resolution to adopt the Town Board's SEQRA findings statement was denied by a four-to-three vote. The Town Board's vote on the special permit, waiver, and area variances remained pending and undecided at that time since the SEQRA findings statement had not been adopted. Several work sessions of the Town Board ensued, at which the project was discussed. In one such session held on June 20, 2006, one of the members of the Town Board stated that, before she was prepared to vote again on the resolution, she wanted to visit a facility similar to the proposed project that was located in Rhode Island. At a subsequent Town Board meeting held on July 25, 2006, a motion by one of the mem-

bers of the Town Board to waive the required 90-day period for reintroduction of the resolution on the SEQRA findings statement was granted. The resolution to approve the SEQRA findings statement thereafter passed by a five-to-two vote. The Town Board also passed the resolution approving the special permit, waiver, and area variances by the same vote count. At the meeting of July 25, 2006, one of the members of the Town Board who had changed the vote he cast at the meeting held on June 6, 2006, explained, inter alia, how his prior concerns regarding the project's impact on the environment, and the proffered benefits package to be provided by the developer had been assuaged.

The petitioners then commenced this proceeding. The Supreme Court, inter alia, granted those branches of the petition which were to annul the determinations of the Town Board on the grounds asserted in the fifth and sixth causes of action, finding that the Town Board acted in an arbitrary and capricious manner by failing to articulate a reason why it adopted the resolution approving the SEQRA findings statement after the resolution had been previously rejected. The remaining branches of the petition were denied, and the remainder of the proceeding was dismissed. The Town Board and the Town appeal, and Caithness separately appeals, from the provisions of the order and judgment that were adverse to them. The petitioners cross-appeal from so much of the order and judgment as was adverse to them.

Initially, the cross appeal has not been rendered academic and is not barred by the doctrine of laches *(see Matter of Citineighbors Coalition of Historic Carnegie Hill v New York City Landmarks Preserv.*

Commn., 2 NY3d 727, 729; *Cohen v Krantz*, 227 AD2d 581). The Town Board, the Town, and Caithness (hereinafter collectively the appellants) have failed to demonstrate that the project is substantially complete. Further, the petitioners did not delay in instituting legal proceedings and sought to maintain the status quo by seeking a preliminary injunction before construction of the project had begun *(see generally Matter of Silvera v Town of Amenia Zoning Bd. of Appeals*, 33 AD3d 706; *Matter of Michalak v Zoning Bd. of Appeals of Town of Pomfret*, 286 AD2d 906; *Vitiello v City of Yonkers*, 255 AD2d 506; *Matter of Uciechowski v Ehrlich*, 221 AD2d 866, 867-868; *cf. Matter of Mehta v Town of Montour Zoning Bd. of Appeals*, 4 AD3d 657, 657-658; *Matter of Group for S. Fork v Planning Bd. of Town of Southampton*, 306 AD2d 281).

The Supreme Court, however, improperly granted those branches of the petition which were to annul the determinations on the grounds asserted in the fifth and sixth causes of action, which alleged that the Town Board acted in an arbitrary and capricious manner by failing to articulate a reason why it passed the resolution approving the SEQRA findings statement after the resolution had been previously rejected. Following the meeting of June 6, 2006, at which the Town Board failed to adopt the resolution, the applications for the proposed land-use approvals were held in abeyance and remained on the Town Board's meeting agenda as "pending decisions" until July 25, 2006. Further, as the Town Board correctly argues, neither SEQRA nor its implementing regulations contain any provision prohibiting the Town Board from reconsidering its own unchanged SEQRA findings statement. Rather, SEQRA only

requires that an involved agency such as the Town Board make its own written findings statement before approving a project subject to an FEIS *(see* 6 NYCRR 617.2[p], 617.11[c]). Contrary to the petitioners' contention, 6 NYCRR 617.11 (a) does not preclude a revote under the circumstances presented here since the Town Board did not vote to amend its finding statements but, rather, revoted on a resolution to adopt its own unchanged SEQRA findings statement. Accordingly, the petitioners' contention that the Town Board lacked the authority and jurisdiction to conduct the revote is without merit. Moreover, the Town Board's determination to adopt, rather than reject, the resolution to approve the SEQRA findings statement was neither arbitrary nor capricious, but was based on reasons readily apparent on the face of the record.

The Supreme Court properly denied the petitioners' remaining SEQRA claims and dismissed those portions of the proceeding. Contrary to the petitioners' contention, the record demonstrates that the Town Board conducted an adequate and appropriate environmental review. In adopting its own findings statement, the Town Board, an involved agency, properly relied upon the FEIS and findings statement prepared by the lead agency, LIPA *(see Matter of Village of Pelham v City of Mount Vernon Indus. Dev. Agency*, 302 AD2d 399; *East Thirteenth St. Community Assn. v New York State Urban Dev. Corp.*, 189 AD2d 352). Moreover, the petitioners are foreclosed by the doctrines of res judicata and collateral estoppel from claiming that the SEQRA review conducted by LIPA was inadequate since those claims were litigated or could have been litigated in the prior hybrid proceeding and action com-

menced by the petitioners in the Supreme Court, Nassau County *(see Fitzgerald v Hudson Natl. Golf Club*, 35 AD3d 533).

The Supreme Court properly determined that the petitioners lacked standing to assert their claims challenging the Town Board's approval of the special permit, waiver, and area variances. The petitioners may not avail themselves of the presumption of injury in fact since they have not demonstrated that their properties lie in close proximity to the project *(see Matter of Long Is. Contractors' Assn v Town of Riverhead*, 17 AD3d 590, 595; *Matter of Rediker v Zoning Bd. of Appeals of Town of Philipstown*, 280 AD2d 548; *Matter of Many v Village of Sharon Springs Bd. of Trustees*, 218 AD2d 845; *Matter of Casement v Town of Poughkeepsie Planning Bd.*, 162 AD2d 685; *see also Matter of Piela v Van Voris*, 229 AD2d 94), and they have otherwise failed to demonstrate that they will suffer any injury which is "in some way different from that of the public at large" *(Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, *774; see Matter of Long Is. Contractors' Assn v Town of Riverhead*, 17 AD3d 590).

The parties' remaining contentions either are without merit or need not be reached in light of our determination. SKELOS, J.P., LIFSON, SANTUCCI and CARNI, JJ., concur.

ENTER:

James Edward Pelzer

Clerk of the Court

SUPREME COURT OF THE
STATE OF NEW YORK

APPELLATE DIVISION : SECOND JUDICIAL
DEPARTMENT

PETER B. SKELOS, J.P.
ROBERT A. LIFSON
FRED T. SANTUCCI
EDWARD D. CARNI, JJ.

Decided on November 25, 2008
2007-05605
(Index No. 29596/06)

IN THE MATTER OF EAST END PROPERTY
COMPANY #1, LLC, *et al.*,

appellants,

—v—

PLANNING BOARD OF TOWN OF BROOKHAVEN, *et al.*,

respondents.

Rosenberg Calica & Birney LLP, Garden City, N.Y. (Robert M. Calica and Judah Serfaty of counsel), for appellants.

Devitt Spellman Barrett, Smithtown, N.Y. (John M. Denby of counsel), for respondent Planning Board of Town of Brookhaven.

Westerman Ball Ederer Miller & Sharfstein, LLP, Mineola, N.Y. (Jeffrey A. Miller and Richard Gabriele of counsel), and Beveridge & Diamond, P.C., New York, N.Y. (Stephen L. Gordon and Michael Murphy of counsel), for respondent Caithness Long Island, LLC (one brief filed).

DECISION & ORDER

In a proceeding pursuant to CPLR article 78 to review a determination of the Planning Board of Town of Brookhaven dated September 25, 2006, which granted site plan approval for the construction of a 350-megawatt dual-fuel, combined cycle combustion turbine electric power generator, the petitioners appeal from a judgment of the Supreme Court, Suffolk County (Spinner, J.), dated May 22, 2007, which dismissed the proceeding on the ground that the petitioners lacked standing.

ORDERED that the judgment is affirmed, with one bill of costs.

The Supreme Court properly concluded that the petitioners lacked standing to commence this proceeding *(see Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, *774; Matter of Long Is. Contractors' Assn. v Town of Riverhead*, 17 AD3d 590, 595; *Matter of Rediker v Zoning Bd. of Appeals of Town of Philipstown*, 280 AD2d 548; *Matter of Many v Village of Sharon Springs Bd. of Trustees*, 218 AD2d 845; *Matter of Casement v Town of Poughkeepsie Planning Bd.*, 162 AD2d 685; *see also Matter of Piela v Van Voris*, 229 AD2d 94).

The petitioners' remaining contentions need not be reached in light of our determination. SKELOS, J.P., LIFSON, SANTUCCI and CARNI, JJ., concur.

ENTER:

James Edward Pelzer

Clerk of the Court

SUPREME COURT OF THE
STATE OF NEW YORK

APPELLATE DIVISION : SECOND JUDICIAL
DEPARTMENT

PETER B. SKELOS, J.P.
ROBERT A. LIFSON
FRED T. SANTUCCI
EDWARD D. CARNI, JJ.

Decided on November 25, 2008
2008-00757
(Index No. 17956/07)

IN THE MATTER OF EAST END PROPERTY
COMPANY #1, LLC, *et al.*,

appellants,

—v—

TOWN BOARD OF TOWN OF BROOKHAVEN, *et al.*,

respondents;

LONG ISLAND POWER AUTHORITY,

additional respondent.

Rosenberg Calica & Birney LLP, Garden City, N.Y. (Robert M. Calica and Judah Serfaty of counsel), for appellants.

Devitt Spellman Barrett, Smithtown, N.Y. (John M. Denby and Jeltje DeJong of counsel), for respondents Town Board of Town of Brookhaven and Planning Board of the Town of Brookhaven.

Westerman Ball Ederer Miller & Sharfstein, LLP, Mineola, N.Y. (Jeffrey A. Miller and Richard Gabriele of counsel), and Beveridge & Diamond, P.C., New York, N.Y. (Stephen L. Gordon and Michael Murphy of counsel), for respondent Caithness Long Island, LLC (one brief filed).

Carter Ledyard & Milburn LLP, New York, N.Y. (Christine A. Fazio, Stephen L. Kass, and Judith M. Wallace of counsel), for additional respondent Long Island Power Authority.

DECISION & ORDER

In a proceeding, inter alia, pursuant to CPLR article 78 to review a determination of the Town Board of Town of Brookhaven dated June 5, 2007, made upon remittitur from the Supreme Court, Suffolk County, which adopted a findings statement pursuant to the State Environmental Quality Review Act (ECL article 8) regarding the approval of the construction of a 350-megawatt dual-fuel, combined cycle combustion turbine electric power generator, the petitioners appeal, as limited by their brief, from so much of an order and judgment (one paper) of the Supreme Court, Suffolk County (Spinner, J.),

dated January 2, 2008, as denied the petition and dismissed the proceeding.

ORDERED that the appeal is dismissed as academic, without costs or disbursements.

In light of our decision and order on a companion appeal from an order and judgment (one paper) of the Supreme Court, Suffolk County, dated May 22, 2007 *(see East End Prop. Co. #1, LLC v Town Bd. of Town of Brookhaven, AD3d* [Appellate Division Docket No. 2007-05041, decided herewith]), this appeal has been rendered academic.

SKELOS, J.P., LIFSON, SANTUCCI and CARNI, JJ., concur.

ENTER:

James Edward Pelzer

Clerk of the Court

SUPREME COURT OF THE
STATE OF NEW YORK

IAS PART XXI - COUNTY OF SUFFOLK

PRESENT:

HON. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

INDEX NO. 2006-29596

ORIG. MOTION DATE: 11/22/06
FINAL SUBMIT DATE: 03/28/07

EAST END PROPERTY COMPANY #1 LLC,
and MARK KASPIEV,

Petitioners,

—against—

THE PLANNING BOARD OF THE TOWN OF
BROOKHAVEN, and CAITHNESS LONG ISLAND, LLC,

Respondents.

This proceeding is related to the following action:

INDEX NO. 2006-23201

EAST END PROPERTY COMPANY #1 LLC, MARK KASPIEV, JOHN MCCONNELL, JOHAN MCCONNELL, DONALD SEUBERT, PATRICIA SEUBERT, FRANCESCA HURLEY, MICHAEL HURLEY, LAURENCE EINUS, EMILY KARLOVITS, STEPHEN HENRY, THE YAPHANK TAXPAYERS AND

CIVIC ASSOCIATION, INC and SOUTH YAPHANK CIVIC ASSOCIATION,

Petitioners-Plaintiffs,

—against—

THE TOWN BOARD OF THE TOWN OF BROOKHAVEN, THE TOWN OF BROOKHAVEN and CAITHNESS LONG ISLAND, LLC,

Respondents-Defendants,

—and—

LONG ISLAND POWER AUTHORITY,

Additional Respondent-Defendant.

UPON the following papers numbered I to 137 read on this Motion:

- Petitioners' Petition & Supporting Papers (Pages 1-26 & Exhibit A);
- Respondent BROOKHAVEN PLANNING BOARD's Answer & Opposition (Pages 27-55 & Exhibits A-C & A-DDDDD);
- Respondent CAITHNESS' Answer & Opposition (Pages 56-116 & Exhibits 1-2 & A);
- Petitioners' Reply (Pages 117-137 &Appendix A); it is,

ORDERED, that the Petition is hereby denied in all respects.

Petitioners move this Court for an Order and Judgment:

a. Pursuant to CPLR Article 78, invalidating, cancelling and annulling a certain Site Plan Resolution rendered by Respondent BROOKHAVEN PLANNING BOARD on September 25, 2006;

b. Pursuant to CPLR 7804(e), directing Respondent BROOKHAVEN PLANNING BOARD to file with its Answer a certified transcript of the Record of proceedings under consideration.

This is special proceeding pursuant to CPLR Article 78. Petitioners seek a review of the actions of Respondents-Defendants, most particularly Respondents-Defendants BROOKHAVEN PLANNING BOARD (there also being a related action against Respondent-Defendant BROOKHAVEN TOWN BOARD, et al, as cited herein above). Petitioners seek to have said review invalidate, cancel and annul the actions of Respondents, culminating in adoption of a Site Plan approval by Respondent BROOKHAVEN PLANNING BOARD on September 25, 2006, regarding a 350 megawatt electric generating plant in the Hamlet of Yaphank, Town of Brookhaven, County of Suffolk and State of New York, known herein as the Caithness Project.

On September 25, 2006, Respondent BROOKHAVEN PLANNING BOARD, premised upon the Special Permit approval of the BROOKHAVEN TOWN BOARD, adopted a Resolution approving the Site Plan for the Caithness project, with numerous covenants and conditions to be met. On October 24, 2006, a Verified Petition was executed against Respondent BROOKHAVEN PLANNING BOARD and

Respondent CAITHNESS, served upon them on October 26, 2006, and October 30, 2006, respectively.

As with the companion action cited herein above, the first issue that must be decided is whether Petitioners have standing to assert this Article 78. Whether parties have standing to institute an action or proceeding is a threshold issue, which must be determined by the Court at the outset of any litigation *(See, Dairylea Cooperative v Walkley*, 38 NY2d 6, 377 NYS2d 451, 339 NE2d 865 [1975]; *Society of Plastics Industry v County of Suffolk*, 77 NY2d 761, 570 NYS2d 778, 573 NE2d 1034 [1991].

In order to demonstrate standing, Petitioners must show that they will suffer a harm that is in some manner different than the harm the public may generally suffer, and that their alleged injuries fall within the zone of interest sought to be promoted or protected by the statute under which the municipality acted *(See, Society of Plastics Industry v County of Suffolk, supra; Rediiker v Zoning Board of Appeals of the Town of Philipstown*, 280 AD2d 548, 721 NYS2d 77 [2 Dept 2001]; *Long Island Business Aviation Association, Inc v Town of Babylon*, 29 AD2d 794, 815 NYS2d 217 [2 Dept 2006]). The Courts have ruled that petitioners were not entitled to an inference of injury because they lived within about one-third of a mile, one-half mile, or between 832 to 2,519 feet from the subject property *(See, Olish v Heaney*, 2003 WL 21276342 [NY SupCt]; *Concerned Citizens for Open Space v City of White Plains*, 2003 WL 22283389 [NY SupCt]; *Oates v Village of Watkins Glen*, 290 AD2d 758, 736 NYS2d 478 [3 Dept 2002]), the last matter involving a petitioner who resided within 530 feet from a proposed Wal-

Mart super center. The status of neighbor does not automatically entitle one to standing for judicial review in every instance *(See, Sun-Brite Car Wash v Board of Zoning & Appeals of the Town of North Hempstead*, 69 NY2d 414, 515 NYS2d 418, 508 NE2d 130 [1987]). Petitioners herein, none of whom live closer than one-half mile, and are not within the required notification area for Special Permit application, pursuant to the Town Code, do not demonstrate they are within the zone of interest, nor that they will suffer an injury different than the public at large, and therefore lack standing to challenge the Resolution adopted by Respondent BROOKHAVEN PLANNING BOARD regarding approval of the Site Plan.

For all the reasons stated herein above and in the totality of the papers submitted herein, it is, therefore,

ORDERED, that the application of Petitioners for an Order and Judgment:

a. Pursuant to CPLR Article 78, invalidating, cancelling and annulling a certain Site Plan Resolution rendered by Respondent BROOKHAVEN PLANNING BOARD on September 25, 2006;

b. Pursuant to CPLR 7804(e), directing Respondent BROOKHAVEN PLANNING BOARD to file with its Answer a certified transcript of the Record of proceedings/under consideration;

is hereby denied in all respects.

Dated: Riverhead, New York
May 22, 2007

/S/ JEFFREY ARLEN SPINNERS
HON. JEFFREY ARLEN SPINNERS, J.S.C.

✓ Final Disposition	Non-Final Disposition
✓ Scan	Do Not Scan

TO:

ROSENBERG CALICA & BIRNEY, LLP
Attorneys for Petitioners-Plaintiffs
100 Garden City Plaza, Suite 408
Garden City, New York 11530

CARTER LEDYARD & MILBURN LLP
Attorneys for Respondent-Defendant LIPA
2 Wall Street
New York, New York 10005-2072

DEVITT SPELLMAN BARRETT, LLP
Attorney for Respondents-Defendants BROOKHAVEN
50 Route 111
Smithtown, New York 11787

BEVERIDGE & DIAMOND, PC
Attorneys for Respondent-Defendant CAITHNESS
477 Madison Avenue, 15th Floor
New York, New York 10022

RIVKIN RADLER, LLP
Attorneys for Respondent-Defendant LIPA
926 Reckson Plaza
Uniondale, New York 11556-0926

WESTERMAN BALL EDERER MILLER
& SHARFSTEIN, LLP
Attorneys for Respondent-Defendant
CAITHNESS
170 Old Country Road, Suite 400
Mineola, New York 11501

SUPREME COURT OF THE STATE OF NEW YORK
IAS PART XXI - COUNTY OF SUFFOLK

INDEX NO. 2006-23201
MOTION SEQ. NO. 001- Mot D
ORIG. MOTION DATE: 09/12/06
MOTION SEQ. NO.: 002 - MD
ORIG. MOTION DATE: 10/18/06
MOTION SEQ. NO.: 003 - MD
ORIG. MOTION DATE: 10/18/06
MOTION SEQ. NO.: 006 - MD
ORIG. MOTION DATE: 10/18/06
FINAL SUBMIT DATE: 03/28/07

PRESENT:

HON. JEFFREY ARLEN SPINNER,
Justice of the Supreme Court

EAST END PROPERTY COMPANY #1 LLC, MARK KASPIEV, JOHN MCCONNELL, JOHAN MCCONNELL, DONALD SEUBERT, PATRICIA SEUBERT, FRANCESCA HURLEY, MICHAEL HURLEY, LAURENCE EINUS, EMILY KARLOVITS, STEPHEN HENRY, THE YAPHANK TAXPAYERS AND CIVIC ASSOCIATION, INC and SOUTH YAPHANK CIVIC ASSOCIATION,

Petitioners-Plaintiffs,

—against—

THE TOWN BOARD OF THE TOWN OF BROOKHAVEN, THE TOWN OF BROOKHAVEN and CAITHNESS LONG ISLAND, LLC,

Respondents-Defendants,

—and—

LONG ISLAND POWER AUTHORITY,

Additional Respondent-Defendant.

This proceeding is related to the following action:

INDEX NO. 2006-29596

EAST END PROPERTY COMPANY #1 LLC, and MARK KASPIEV,

Petitioners,

—against—

THE PLANNING BOARD OF THE TOWN OF BROOKHAVEN, and CAITHNESS LONG ISLAND, LLC,

Respondents.

UPON the following papers numbered 1 to 575 read on these Motions:

- Petitioners-Plaintiffs' Order to Show Cause (001) & Supporting Papers (Pages 1-105 & Exhibits A-I);

- Respondent-Defendant BROOKHAVEN's Answer & Opposition (Pages 106-176 & Exhibits A-C, A, & A-QQQQ);
- Respondent-Defendant LIPA's Answer & Opposition (Pages 177-254 & Exhibits A-O & 4 unmarked exhibits attached to Memo of Law)
- Respondent-Defendant LIPA's Motion (003) & Supporting Papers (Pages 255-279 & Exhibits A-B);
- Respondent-Defendant CAITHNESS' Motion (002) & Supporting Papers (Pages 280-381 & Exhibits A-R & A);
- Petitioners-Plaintiffs' Reply (Pages 382-454);
- Petitioners-Plaintiffs' Letter (by Counsel) dated 10/30/06 (Pages 455-456);
- Respondent-Defendant LIPA's Reply (Pages 457-478);
- Respondent-Defendant BROOKHAVEN's Support of Dismissal (Pages 479-501 & Exhibits A-B);
- Respondent-Defendant CAITHNESS' Reply (Pages 502-553);
- Petitioners-Plaintiffs' Letter (by Counsel) dated 12/21/06 (Pages 554-556 & 1 unmarked Exhibit);
- Petitioner-Plaintiff's Letter (by Counsel) dated 05/02/07 (Pages 557-559 & 1 unmarked Exhibit);
- Respondent-Defendant LIPA's Letter (by Counsel) dated 05/03/07 (Pages 560-561);
- Petitioners-Plaintiffs' Letter (by Counsel) dated 05/03/07 (Pages 562-564);

- Respondent-Defendant BROOKHAVEN's Letter (by Counsel) dated 03/02/07 [sic] (Pages 565-566);
- Respondent-Defendant CAITHNESS' Letter (by Counsel) dated 05/04/07 (Pages 567-571);
- Petitioners-Plaintiffs' Letter (by Counsel) dated 05/07/07 (Pages 572-575);
- Respondent-Defendant CAITHNESS' Letter (by Counsel) dated 05/09/07 (Pages 576-578); it is,

ORDERED, that the Combined Petition-Complaint and Order to Show Cause of Petitioners-Plaintiffs (001) is hereby granted in part and denied in part, as set forth herein below; the Motion of Respondent-Defendant CAITHNESS (002) is hereby denied in all respects; the Motion of Respondent-Defendant LIPA (003) is hereby denied in all respects; and the second Order to Show Cause of Petitioners-Plaintiffs (006) is hereby dismissed, as same is rendered moot by the decisions rendered herein.

Petitioners-Plaintiffs move this Court (001) for an Order and Judgment:

a. Pursuant to CPLR Article 78, cancelling, annulling and invalidating a certain Resolution of Respondent-Defendant BROOKHAVEN TOWN BOARD, dated July 25, 2006, which, *inter alia*, approved a proposed 350 megawatt electrical generating plant, to be constructed by Respondent-Defendant CAITHNESS on an approximately 96 acre parcel located in the Hamlet of Yaphank, Town of Brookhaven, New York (Caithness Project) by granting a special permit pursuant to the Town Code of Respondent-Defendant BROOKHAVEN and substantial variances and

waivers from established zoning requirements (Resolution);

b. Pursuant to CPLR Article 78, annulling and invalidating a further Resolution of Respondent-Defendant BROOKHAVEN TOWN BOARD, dated July 25, 2006, *inter alias*, rendered under the State Environmental Quality Review Act (SEQRA), by adopting a Finding Statement under SEQRA, by approving and accepting a prior Final Environmental Impact Statement (FEIS) for the Caithness Project promulgated and adopted by Respondent-Defendant LIPA, acting as purported "lead agency" under SEQRA (Resolution II);

c. Cancelling, annulling and invalidating all other Resolutions, actions and authorizations granted by Respondent-Defendant BROOKHAVEN TOWN BOARD and/or Respondent-Defendant BROOKHAVEN, for the purpose of authorizing and implementing the Caithness Project;

d. Pursuant to CPLR 3001, granting a Judgment in favor of Petitioners-Plaintiffs declaring such other matters with respect to the lawfulness of the procedures undertaken, the adoption of, the effectiveness and implementation of Resolution I, Resolution II and all other actions and authorizations granted by Respondent-Defendant BROOKHAVEN TOWN BOARD and/or Respondent-Defendant BROOKHAVEN with reference to the Caithness Project as may be required to fully adjudicate the claims and controversies recited herein;

e. Granting a permanent injunction in favor of Petitioners-Plaintiffs enjoining Respondents-Defen-

dants from implementing Resolution I, Resolution II or any other approvals authorizing the construction or implementation of the Caithness Project;

f. Granting Petitioners-Plaintiffs the costs and disbursements hereof.

Petitioners-Plaintiffs' above cited Order to Show Cause is filed upon their Petition-Complaint, which sets forth the above stated demands for relief under the following Claims for Relief:

1. As and for a First Claim for Relief, Respondent-Defendant BROOKHAVEN TOWN BOARD having violated Town Law and the Respondent-Defendant BROOKHAVEN Town Code (Town Code) in adopting Resolution I, said Resolution should therefore be adjudged to be null, void, arbitrary and capricious, and of no force and effect;

2. As and for a Second Claim for Relief, Respondent-Defendant BROOKHAVEN TOWN BOARD having violated SEQRA, in approving Resolutions I and II, said Resolutions should therefore be adjudged to be null, void, arbitrary and capricious, and of no force and effect;

3. As and for a Third Claim for Relief, Respondent-Defendant LIPA having violated SEQRA, Public Authorities Law § 1020-ff(aa) and State Finance Law §123-b in its SEQRA determination and approval of the PPA, the adoption of Resolutions I and II by Respondent-Defendant BROOKHAVEN TOWN BOARD premised thereupon must be annulled, and declared null, void and of no force and effect;

4. As and for a Fourth Claim for Relief, Respondent-Defendant BROOKHAVEN TOWN BOARD having violated SEQRA, Open Meetings Law (Public Officers Law Article 7), Town Law, the Town Code, Respondent-Defendant BROOKHAVEN TOWN BOARD procedures (Town Board Procedures), and having engaged in "contract zoning", Resolutions I and 1I should therefore be adjudged to be null, void, arbitrary and capricious, and of no force and effect;

5. As and for a Fifth Claim for Relief, Respondent-Defendant BROOKHAVEN TOWN BOARD having violated SEQRA, the Town Code, Town Law, Open Meetings Law (Public Officers Law Article 7), Town Board Procedures, and various others laws, conducting themselves in an *ultra vires* manner, in adopting Resolution II by the holding of a "re-vote" (Resolution I having been also erroneously included herein in the filed pleadings) and having considered a Community Benefits Package without legal authority, Resolutions I and II should therefore be adjudged to be null, void, arbitrary and capricious, and of no force and effect;

6. As and for a Sixth Claim for Relief, pursuant to CPLR 3001, requesting that the Court declare such matters concerning the lawfulness of the procedures preceding consideration and adoption of, as well as concerning the adoption and the lawfulness of, Resolutions I and II, the FEIS, the Findings Statement, the "re-vote", and all other actions taken by or on behalf of Respondent-Defendant BROOKHAVEN TOWN BOARD to approve the Caithness Project which are neces-

sary to result in full, complete andjust resolution of all claims and controversies among the parties relating to such matters, granting permanent injunctive relief barring Respondents-Defendants from carrying out, implementing or otherwise acting to implement or carry out Resolutions I and II or otherwise construct the Caithness Project;

Respondent-Defendant LIPA moves this Court (003) for an Order, pursuant to CPLR 3211(a) (1), (3), (4), (5) and (7), dismissing Petitioners-Plaintiffs' Sixth Claim for Relief asserted in the Petition-Complaint, on the grounds that the defense is founded upon documentary evidence, that Petitioners-Plaintiffs lack legal capacity to assert the Sixth Claim for Relief, that there is another action pending between the same parties for the same cause of action as asserted in the Sixth Claim, and that the Sixth Claim for Relief is barred by the doctrine of collateral estoppel and *res judicata*.

Respondent-Defendant CAITHNESS moves (002) this Court for an Order:

(a) Pursuant to 22 NYCRR § 130-1.1, imposing sanctions (in the form of litigation costa and attorney's fees) on Petitioners-Plaintiffs and their Counsel:

(I) for having raised issues and claims in this case that are plainly barred by the doctrines of *res judicata* and collateral estoppel, *as* a result of Petitioners-Plaintiffs' having previously raised (and lost) these same issues and claims in an action before Justice Cozzens, entitled *East End et al v Kessel et al*, Supreme Court, Nassau

County, Index No. 1410-2006 (Nassau Action);

(ii) for not advising this Court of the decision by Justice Cozzens in the Nassau Action, dated August 22, 2006, and entered on August 25, 2006 (Nassau Decision);

(iii) for not advising this Court that Petitioners-Plaintiffs appealed the Nassau Decision to the Appellate Division, Second Department;

(b) Pursuant to CPLR 3211(a) (1), (3), (4), (5) and (7), dismissing the Sixth Claim for Relief asserted in Petitioners-Plaintiffs' Petition-Complaint, which seeks declaratory relief under CPLR 3001 and related injunctive relief, on the grounds that:

(I) the alleged plenary Sixth Claim is duplicative of the First through Fifth Claims raised under CPLR Article 78;

(ii) it fails to state any claim for relief which is different that Petitioners-Plaintiffs' Article 78 claims;

(iii) there is another action pending between the parties for the same cause of action (Nassau Action);

(iv) many of the issues and claims in the Sixth Claim were decided in the Nassau Action and are barred by the doctrine of *res judicata* and collateral estoppel.

Petitioners-Plaintiffs move this Court (006) for an Order, pursuant to CPLR 7805, staying the Resolutions under review by enjoining and restraining

Respondent-Defendant CAITHNESS, its agents, servants and employees (including without limitation, Ross D. Ain, Senior Vice President) from undertaking construction, development, demolition, excavation, grading, paving, removal of vegetation, or any further action in furtherance of the construction of a proposed 350 megawatt electric generating facility on a 96 acre parcel located in the Hamlet of Yaphank, Town of Brookhaven, County of Suffolk, State of New York, pursuant to a certain Special Permit and Variances heretofore granted by Respondent-Defendant BROOKHAVEN TOWN BOARD on July 25, 2006, and pursuant to a certain Site Plan approved by Resolution of Respondent-Defendant BROOKHAVEN's Planning Board, dated September 25, 2006, pending determination of this matter and the related Article 78 against Respondent-Defendant BROOKHAVEN's Planning Board, as referenced herein above, by this Court.

INTRODUCTION:

This is a "hybrid" action, seeking relief by way of a special proceeding pursuant to CPLR Article 78, as well as a declaratory judgment pursuant to CPLR Article 30, § 3001, and injunctive relief pursuant to CPLR Article 63. Petitioners-Plaintiffs seek a review of the actions of Respondents-Defendants, most particularly Respondents-Defendants BROOKHAVEN and BROOKHAVEN TOWN BOARD (there also being a related action against Respondent-Defendant BROOKHAVEN's Planning Board, et al, as cited herein above). Petitioners-Plaintiffs seek to have said review invalidate, declare unlawful, arbitrary and capricious, annul, void and in all respects

render of no force and effect, the actions of Respondents-Defendants, culminating in adoption of two resolutions by Respondent-Defendant BROOKHAVEN TOWN BOARD on July 25, 2006, regarding approvals of a SEQRA determination and a special use permit for a 350 megawatt electric generating plant in the Hamlet of Yaphank, Town of Brookhaven, County of Suffolk and State of New York, known herein as the Caithness Project. The Court recites a brief statement of relevant facts, in order to cull almost 600 pages of argumentation (and several times that number of pages of exhibits) into a manageable overview of the matter at hand.

STATEMENT OF FACTS:

Respondent-Defendant LIPA selected Respondent-Defendant CAITHNESS to provide a state-of-the-art electric generating facility, which Respondent-Defendant CAITHNESS proposes to construct on a 15 acre portion of a 96 acre parcel, located as identified herein above, said land being zoned "L-1", light industry by Respondent-Defendant BROOKHAVEN prior to any action herein; said 15 acre portion being located within an Empire Development Zone, also established prior to any action taken herein.

Respondent-Defendant LIPA took on the status of "lead agency", pursuant to SEQRA (6 NYCRR 617.2(u)), in order to perform a review of the potential environmental impacts of construction and operation of such a facility, prior to selection of the present site. After it was chosen, Respondent-Defendant BROOKHAVEN worked with Respondent-Defendant LIPA, as an "involved agency", to scope

the Environmental Impact Statement, that process being concluded in December, 2005, after which several of the Petitioners-Plaintiffs herein instituted the Nassau Action against several of the Respondents-Defendants herein, regarding said SEQRA process. That litigation did not, and could not, include Respondent-Defendant BROOKHAVEN. During that time, Respondents-Defendants LIPA and BROOKHAVEN began negotiating a Community Benefits Package which consisted principally of Payment-In-Lieu-Of-Taxes (PILOTs).

The L-1 zoning district of Respondent-Defendant BROOKHAVEN only permits electric generating facilities by the granting of a special permit by Respondent-Defendant BROOKHAVEN TOWN BOARD, subject to criteria set forth in various sections of the Town Code. Pursuant to § 85-31 of said Town Code, Respondent-Defendant CAITHNESS applied for such special permit, with requests for variances from certain requirements within that zoning district, including an exhaust stack height of 170 feet (exceeding the Town Code imposed limitation of 125 feet) and a building height of 80 feet (exceeding the Town Code imposed limitation of 50 feet).

On March 9, 2006 and April 25, 2006, public hearings regarding said application were held by Respondent-Defendant BROOKHAVEN TOWN BOARD, each allegedly lasting about five hours. Presentations were made by representatives of Respondents-Defendants LIPA and CAITHNESS, and testimony was taken in opposition (including several Petitioners-Plaintiffs herein) and in support. Further presentations, discussions and comments continued through several other meetings and work sessions of

Respondent-Defendant BROOKHAVEN TOWN BOARD, with resolutions approving the SEQRA determination and special permit being carried forward on said Respondent-Defendant's Agenda throughout this time period.

On June 6, 2006, with all the members of Respondent-Defendant BROOKHAVEN TOWN BOARD present, the resolution approving the SEQRA determination, as set forth in the FEIS adopted by Respondent-Defendant LIPA, was voted upon, with four members voting no, and three voting yes. As stated on page 32 of Petitioners-Plaintiffs' Reply Memorandum of Law, dated October 23, 2006, *"Town's Return, exhibit WWW. . .statement of Supervisor Foley following the no-vote, indicating that the SEQRA certification had been "defeated".";* as stated on page 32 of Respondents-Defendants BROOKHAVEN and BROOKHAVEN TOWN BOARDs' Memorandum of Law, dated September 22, 2006, ". . .the *Board voted on June 6, 2006 against accepting the SEQRA findings. . .";* and as states on page 21 of Respondent-Defendant CAITHNESS' Brief, dated September 25, 2006, *"Indeed, as Town Supervisor Foley precisely explained, "By [the SEQRA Findings] being defeated we cannot therefore, we cannot then go to 6A (Resolution 11 which is the actual application for the variance for the Caithness Power plant." See Return Exhibit WWW (emphasis added)."*

On July 25, 2006, Respondent-Defendant BROOKHAVEN TOWN BOARD passed a number of resolutions regarding the Caithness Project, including:

1. Resolution by Councilwoman Walsh, seconded by Councilwoman Kepert, pursuant to Town Board Rules of Procedure, Article II, Section 3, Subsection A5, to waive the 90 day requirement before reintroduction of the SEQRA Resolution of June 6, 2006, for acceptance and adoption of the Findings Statements: adopted by a vote of 5-2;

2. Resolution by Councilwoman Walsh, seconded by Councilwoman Kepert, to accept the SEQRA Resolution of June 6, 2006, for acceptance and adoption of the Findings Statements, which was adopted by a vote of 5-2 after a Motion to Table, by Councilman McCarrick, seconded by Councilwoman Bissonette: defeated by a vote of 2-5;

3. Resolution by Councilwoman Kepert, seconded by Councilman Fiore-Rosenfeld, to take out of order from the Decision Pending Agenda, the resolution to approve the special permit application for the Caithness Project, with variances and waivers: adopted by a vote of 5-2;

4. Resolution by Councilwoman Kepert, seconded by Councilman Fiore-Rosenfeld, to approve the special permit application for the Caithness Project, with variances and waivers: adopted by a vote of 5-2;

Councilwoman Walsh, who moved the waiver of the 90 day rule and the reconsideration of the SEQRA resolution that had been previously defeated, had voted against approval of said resolution at the June 6, 2006 meeting of Respondent-Defendant BROOKHAVEN TOWN BOARD, and therefore having

been on the prior prevailing side was a proper party to make said motions.

The Petition-Complaint herein was verified by the various Petitioners-Plaintiffs between August 17 and August 22, 2006, and filed with the Court on August 23, 2006. Attached to Petitioners-Plaintiffs Order to Show Cause herein, signed by this Court on August 22, 2006, is a copy of the Nassau Action, which is also referenced in Petitioners-Plaintiffs papers supporting same. The decision of the Hon. Justice R. Bruce Cozzens was also rendered on August 22, 2006, the fact of which Petitioners-Plaintiffs and their Counsel could not have been aware when they sought the signature of this Court on their Order to Show Cause.

On September 25, 2006, the Planning Board of Respondent-Defendant BROOKHAVEN (Respondent in the related Article 78 cited herein above), premised upon the Special Permit approval of the Respondent-Defendant BROOKHAVEN TOWN BOARD, adopted a Resolution approving the Site Plan for the Caithness project, with numerous covenants and conditions to be met. On October 24, 2006, a Verified Petition was executed against Respondent-Defendant BROOKHAVEN's Planning Board and Respondent-Defendant herein CAITHNESS, served upon them on October 26, 2006, and October 30, 2006, respectively.

As this Court has stated in prior decisions, from the start it should be noted that it is well settled law in the State of New York that a Court may not substitute its own judgment for that of the reviewing board *(see: Janiak v. Planning Board of the Town of Greenville*, 159 AD2d 574, 552 NYS2d 436 [2nd

Dept], *appeal denied*, 76 NY2d 707, 560 NYS2d 989, 561 NE2d 889 [1990]; *Mascony Transport and Ferry Service v. Richmond*, 71 AD2d 896, 419 NYS2d 628 [2nd Dept 1979], *aff'd*, 49 NY2d 969, 428 NYS2d 948, 406 NE2d 803 [1980]). Therefore, if the decision rendered by the reviewing board is within the scope of the authority delegated to it, the Court may not interfere and annul it, unless said decision is arbitrary, capricious or unlawful *(see, Castle Properties Co. v. Ackerson*, 163 AD2d 785, 558 NYS2d 334 [3rd Dept 1990]).

RESPONDENTS-DEFENDANTS' MOTIONS:

Beginning with that portion of the Motion (002) by Respondent-Defendant CAITHNESS for sanctions against Petitioners-Plaintiffs and their Counsel, the Court notes that Petitioners-Plaintiffs informed this Court of the pendency of the Nassau Action, including attaching a copy of the Petition-Complaint therein to their support papers filed in the instant action before this Court, and that there was absolutely nothing contumacious nor wilful in their conduct, there being, therefore, nothing to justifying sanctions.

As to remainder of the Motion (002) by Respondent-Defendant CAITHNESS, and the Motion (003) by Respondent-Defendant LIPA, both basically seek to dismiss the Sixth Claim for Relief asserted in the Petition-Complaint herein, upon the grounds that:

a. It fails to state a claim for relief different from those asserted in the instant Article 78;

b. There is another action pending between the same parties for the same cause of action asserted therein;

c. It is barred by the doctrine of collateral estoppel and *res judicata*.

This Court finds that, in fact, the Sixth Claim for Relief, asserted pursuant to CPLR Article 30, does seek relief different from the other five Claims for Relief asserted pursuant to CPLR Article 78. The difference between relief requested pursuant to Articles 30 and 78 are well settled. One need look no further than Professor David D. Siegel's Practice Commentary at CPLR 3001, answering the question *'What is a Declaratory Judgment?"*. Prof. Siegel notes that, *"The declaratory judgment action differs from all others in one major respect: the others end in a judgment enforcible [sic] through some kind of coercive relief. . .The declaratory judgment, on the other hand, just declares the rights of the parties: this marriage is valid; this divorce is not. . . The declaratory judgment recognizes that many disputes are resolved by a mere judicial statement. . . rather than remitting them to seek coercive steps against one another."*.

On the other hand, one might view the other facet of this hybrid action, the Article 78 portion (Claims First through Fifth), as the 'coercive relief sought by Petitioners-Plaintiffs, pursuant to the rights of the parties established and promulgated by the Court in the Declaratory Judgment facet of this hybrid action. CPLR 7801 sets forth that, *"Relief previously obtained by writs of certiorari to review, mandamus or prohibition shall be obtained in a proceeding under this article."*. So, obviously,

Petitioners-Plaintiffs are requesting that the Court establish and promulgate the rights of the parties, and by writs of certiorari and mandamus, review the actions of Respondents-Defendants and remand them for proper action, if so dictated by the Court's review. Therefore, these are quite clearly different requests for relief, and do not support dismissal of the Sixth Claim for Relief.

The Court finds that the other action pending is not exactly between the same parties, for not exactly the same cause of action, and that the differences are significant. Neither Respondents-Defendants BROOKHAVEN and BROOKHAVEN TOWN BOARD, nor their actions, are part of that other action, the Nassau Action, decided by Justice Cozzens, nor could the Sixth Claim for Relief be disposed of in the Nassau Action, as Petitioners-Plaintiffs are seeking the Court establish and promulgate the rights of parties not part of said Nassau Action for actions by those non-parties that were not asserted before Justice Cozzens, since they had not yet occurred. Therefore, these are also quite clearly different requests for relief, and do not support dismissal of the Sixth Claim for Relief.

That brings the Court's review of these Motions to the arguments proffered by movants regarding *res judicata* and collateral estoppel, emanating from Justice Cozzens' decision in the Nassau Action. While *res judicata* disposes of some of the issues pursuant to the Sixth Claim for Relief, and collateral estoppel disposes of more, they are not completely dispositive of all the issues to be considered under said Claim for Relief, for the same reasons set forth in the preceding paragraph, and therefore the

Motions to dismiss the Sixth Claim for Relief must be denied.

PETITIONERS-PLAINTIFFS' COMBINED PETITION-COMPLAINT:

Res judicata and collateral estoppel having been raised, the Court notes that there are a multitude of issues that are clearly disposed of by the decision in the Nassau Action, as the following review of the each of the Claims for Relief in the underlying Petition-Complaint, and the specific requests fo relief in the instant Order to Show Cause reveals, vastly limiting the matters upon which this Court needs to render its decision. Still further, there remains the issue of standing, which to some extent is also decided on the basis of *res judicata* and collateral estoppel, which will be addressed as well in the following review.

The Court notes the well proffered discussion of Counsel for Respondent-Defendant LIPA regarding the doctrines of *res judicata* and collateral estoppel. New York has adopted the "transactional analysis" approach regarding application of the doctrine of *res judicata*, setting forth that once a claim has been rendered to a final conclusion, all other claims arising therefrom on the same transaction or series of transactions are barred, including where based on differing theories or seeking differing remedies *(See, O'Brien v City of Syracuse*, 54 NY2d 353, 445 NYS2d 687 [1981]). The foundation upon which the doctrine of *res judicata* is built is the avoidance of conflicting judicial decisions *(See, Schuylkill Fuel Corp v Nieberg Realty Corp*, 250NY 308, 165 NE 456

[1929]). The related doctrine of collateral estoppel instead focuses on issues which have already been litigated, setting forth two basic requirements for application: (1) Identicality of the issue decided in the prior action with the issue which is decisive of the present matter; (2) Full and fair opportunity to have contested the issue in the prior action *(See, Halyalker v Board of Regents of State of New York*, 72 NY2d 261, 532 NYS2d 85 [1988]; *All Terrain Properties, Inc v Hoy*, 265 AD2d 87, 705 NYS2d 350 [1 Dept 2000]]).

First Claim for Relief:

The First Claim for Relief asserts that Respondent-Defendant BROOKHAVEN TOWN BOARD violated both Town Law and the Town Code in adopting the Special Permit Resolution, and therefore said Resolution should be declared null, void, arbitrary, capricious and of no force and effect. Here, the first issue that must be decided is whether Petitioners-Plaintiffs have standing to assert this Claim for Relief. As pointed out by Counsel for Respondents-Defendants BROOKHAVEN and BROOKHAVEN TOWN BOARD, whether parties have standing to institute an action or proceeding is a threshold issue, which must be determined by the Court at the outset of any litigation *(See, Dairylea Cooperative v Walkley*, 38 NY2d 6, 377 NYS2d 451, 339 NE2d 865 [1975]; *Society of Plastics Industry v County of Suffolk*, 77 NY2d 761, 570 NYS2d 778, 573 NE2d 1034 [1991].

In order to demonstrate standing, Petitioners-Plaintiffs must show that they will suffer a harm that is in some manner different than the harm the public may

generally suffer, and that their alleged injuries fall within the zone of interest sought to be promoted or protected by the statute under which the municipality acted *(See, Society of Plastics Industry v County of Suffolk, supra; Redilker v Zoning Board of Appeals of the Town of Philipstown*, 280 AD2d 548, 721 NYS2d 77 [2 Dept 2001]; *Long Island Business Aviation Association, Inc v Town of Babylon*, 29 AD2d 794, 815 NYS2d 217 [2 Dept 2006]). The Courts have ruled that petitioners were not entitled to an inference of injury because they lived within about one-third of a mile, one-half mile, or between 832 to 2,519 feet from the subject property *(See, Olish v Heaney*, 2003 WL 21276342 [NY SupCt]; *Concerned Citizens for Open Space v City of White Plains*, 2003 WL 22283389 [NY SupCt]; *Oates v Village of Watkins Glen*, 290 AD2d 758, 736 NYS2d 478 [3 Dept 2002]), the last matter involving a petitioner who resided within 530 feet from a proposed Wal-Mart super center. The status of neighbor does not automatically entitle one to standing for judicial review in every instance *(See, SunBrite Car Wash v Board of Zoning & Appeals of the Town of North Hempstead*, 69 NY2d 414, 515 NYS2d 418, 508 NE2d 130 [1987]). Petitioners-Plaintiffs herein, none of whom live closer than one-half mile, and are not within the required notification area for Special Permit application, pursuant to the Town Code, do not demonstrate they are within the zone of interest, nor that they will suffer an injury different than the public at large, and therefore lack standing to challenge Resolution I adopted by Respondent-Defendant BROOKHAVEN TOWN BOARD regarding approval of the Special Permit, specifically.

Therefore, the First Claim for Relief must be dismissed in all respects.

Second Claim for Relief:

The Second Claim for Relief asserts that Respondent-Defendant BROOKHAVEN TOWN BOARD violated SEQRA, in approving the Special Permit Resolution and the SEQRA Resolution, and therefore said Resolutions should be declared null, void, arbitrary, capricious and of no force and effect. For the reasons set forth herein above disposing of the First Claim for Relief, Petitioners-Plaintiffs lack standing to challenge the adoption of the Special Permit Resolution, including Petitioners-Plaintiffs assertion in this Claim for Relief that the existence of Atlantic Point and its inhabitants was not considered.

First, this Court notes that, pursuant *to res judicata* and collateral estoppel, the decision in the Nassau Action clearly establishes that the Petitioners-Plaintiffs do, in fact, have standing pursuant to SEQRA, and this Court agrees. Specifically, Justice Cozzens wrote, "*. . .these petitioners have standing to bring this action for SEQRA causes of action*", after having named various Petitioners-Plaintiffs in the instant action. Therefore, the issue of Respondent-Defendant BROOKHAVEN TOWN BOARD's adoption of the SEQRA Resolution on July 25, 2006, is properly brought before this Court.

As to the assertions that Respondents-Defendants violated SEQRA by way of Impermissible Segmentation regarding the natural gas pipeline, and a failure to prepare and adopt a supplemental environmental impact statement (SEIS) following

discovery of a pine barrens ecosystem, Petitioners-Plaintiffs cannot re-litigate these SEQRA questions, as they were specifically disposed of, pursuant to collateral estoppel, since both were directly addressed in the decision in the Nassau Action, regarding the lead agency's adoption of the FEIS. Justice Cozzens wrote:

a. in ruling on the issue of Impermissible Segmentation, ". . .*SEQRA is preempted by FERC. . . respondents motion to dismiss is granted. . .*"; and

b. in ruling on the issue of the SEIS (specifically including, but not limited to. the assertion that ". . .a *rare plant community would be affected. . .*"),".. .*petitioner's allegations do not amount to specific significant adverse environmental impacts not addressed or inadequately addressed in the FEIS. (6 NYCRR 617.9 [a] [7] [1]). . . defendant's motion is granted. . .*".

Therefore, other than on the issue of standing to challenge pursuant to SEQRA, the Second Claim for Relief must be dismissed in all respects.

Third Claim for Relief:

The Third Claim for Relief asserts that, Respondent-Defendant LTA having violated SEQRA, Public Authorities Law § 1020-ff(aa) and State Finance Law § 123-b in its SEQRA determination and approval of the PPA, the subsequent adoption of the Special Permit Resolution and the SEQRA Resolution by Respondent-Defendant BROOKHAVEN TOWN BOARD, premised upon said unlawful actions, cannot be sustained, and therefore said adoptions must

be declared null, void and of no force and effect. Again, for the reasons set forth herein above disposing of the First Claim for Relief, Petitioners-Plaintiffs lack standing to challenge the adoption of the Special Permit Resolution.

As to the assertion that Respondent-Defendants LTA's violation of the three alleged areas of law in their preparation and adoption of the FEIS renders a nullity Respondent-Defendant BROOKHAVEN TOWN BOARD's adoption of their SEQRA Resolution, the Court again notes that Petitioners-Plaintiffs cannot re-litigate these questions as they were disposed of, pursuant to *res judicata*, since all three were directly addressed in the decision in the Nassau Action, regarding the lead agency's adoption of the FEIS. Justice Cozzens wrote:

a. in ruling on the issue of the environmental review process being procedurally improper, "*. . .the Court finds that the respondents complied with the procedural requirements of SEQRA. . . that any perceived procedural defects cannot be deemed to be fatal or require nullification of the entire environmental review procedure, which was otherwise undertaken in accordance with SEQRA. (See, Business and Community Coalition Save Brownsville v NYCDEP and Dept, 1991] 173 AD 2d 586, 570 NYS 2nd 169). . . respondents motion to dismiss is granted. . .*", regarding the First Cause of Action, and the Court further dismissed other challenges to the SEQRA process in said proceeding under the Third and Fourth Causes of Action therein;

b. in ruling on the issue of violating Public Authorities Law § 1020-L in order to demonstrate standing ". . .*It is incumbent upon petitioners to show an injury in fact that is different from that of the general public. Society of Plastics Industry v County of Suffolk (1991) 77 NY2d 761, 570 NYS2d 778. . . When a petitioner fails to show an injury in fact, being a ratepayer of a utility does not confer standing. Lederle Laboratories v Public Service Commission (3*rd *Dept, 1981) 84 A.D.2d 900, 444 NYS2d 779.*", dismissing that cause of action; and

c. in ruling on the issue of violating State Finance Law § 123-b, regarding the PPA and the Community Benefits Package, "*. . .petitioner fail to allege the use of any state funds. . . A State Finance Law action can be brought only when there is a wrongful expenditure of state funds. Weimer v Board of Education (1981) 52 NY2d 148, 436 NYS2d 853. The petitioner must show that the challenged expenditures are traced to identifiable State funds and are an illegal use of funds. Public Utility Law Project of New York, Inc v New York State Public Service Commission (3rd Dept., 1998) 252 AD2d 55, 681 NYS2d 396*", dismissing that cause of action.

Therefore, since the assertion that the actions of Respondent-Defendant LIPA were in violation of law regarding these matters cannot be sustained, then the allegation that the actions of Respondent-Defendant BROOKHAVEN TOWN BOARD, reliant thereupon, can neither be sustained, and the Third Claim for Relief must be dismissed in all respects.

Fourth Claim for Relief:

The Fourth Claim for Relief asserts that Respondent-Defendant BROOKHAVEN TOWN BOARD violated SEQRA, Open Meetings Law (Public Officers Law Article 7), Town Law, the Town Code and Town Board Procedures, and engaged in "contract zoning", in approving the Special Permit Resolution and the SEQRA Resolution, and therefore said Resolutions should be declared null, void, arbitrary, capricious and of no force and effect. Once again, for the reasons set forth herein above disposing of the First Claim for Relief, Petitioners-Plaintiffs lack standing to challenge the adoption of the Special Permit Resolution, including Petitioners-Plaintiffs assertions in this Claim for Relief claiming "contract zoning" and violations of Town Law and the Town Code. Furthermore, for the reasons set forth herein above regarding the decision in the Nassau Action disposing of the issue of the environmental review process being procedurally improper, Petitioners-Plaintiffs cannot re-litigate general assertions of violation of SEQRA herein.

As to Petitioners-Plaintiffs assertion that Respondent-Defendant BROOKHAVEN TOWN BOARD violated the Open Meetings Law (Public Officers Law Article 7), upon a thorough review of said Article and all the submissions by all parties herein, the Court finds no substantive allegations or proof that such a violation occurred. As pointed out by Counsel for Respondents-Defendants BROOKHAVEN and BROOKHAVEN TOWN BOARD, in order for a gathering of members of a public body to constitute a "meeting" pursuant to Public Officers Law, there must have been a quorum present *(See, Britt v*

County of Niagara, 82 AD2d 65, 440 NYS2d 790 [4 Dept 1981]; *Buffalo Evening News, Inc v Buffalo Municipal Housing Authority*, 134 Misc2d 155, 510 NYS2d 422 [SuptCt. New York Co, 1986]). Similarly to the instant matter, in *Olish v Heaney, supra*, petitioners bolstered their claims of an Open Meetings violation through newspaper articles, and as with this matter, the Court therein determined that the record did not support such a claim. In order to sustain such an assertion, more than mere conclusory allegations are requisite. The statement of Councilman Mazzei proffered by Petitioners-Plaintiffs that "*I have been to many, many meetings on both the Town Board meetings and outside of the Town Board. . .*" does not demonstrate that those meetings "*outside of the Town Board*" qualify as 'meetings' within the legal definition of Public Officers Law, Article 7, the term 'meeting' having diverse and varied definitions as used within conversational context that do not rise to a violation of the Open Meetings Law.

As to Petitioners-Plaintiffs assertion that Respondent-Defendant BROOKHAVEN TOWNBOARD violated their own Town Board Procedures, once again the record does not support such allegations. Article II (Meetings & Hearings) of said Respondent-Defendant's Rules of Procedure, at Section 3 (Rules of Procedure), Subsection A.5, states that, "*A Resolution, Local Law or Ordinance that receives less than a majority of votes shall not be reintroduced for ninety days (90) or unless this rule is waived by a super majority vote of the Town Board.*". The Statement of Facts set forth herein above demonstrates beyond dispute that said Respondent-Defendant did in fact move by super majority to

reintroduce the SEQRA Resolution challenged by Petitioners-Plaintiffs herein, and that they voted by super majority to consider it out of turn as well, prior to conducting another vote regarding said Resolution, and therefore their actions did comply with their own Rules of Procedure, and this challenge cannot be sustained.

Therefore, the Fourth Claim for Relief must be dismissed in all respects.

Fifth Claim for Relief:

The Fifth Claim for Relief asserts that Respondent-Defendant BROOKHAVEN TOWN BOARD, having violated SEQRA, the Town Code, Town Law, Open Meetings Law, and Town Board Procedures, conducted themselves in an *ultra vires* manner in adopting the SEQRA Resolution:

1. by the holding of a "re-vote"; and
2. by considering a Community Benefits Package without legal authority;

and therefore said Resolution should be declared null, void, arbitrary, capricious and of no force and effect. For all the reasons set forth herein above in this decision, the assertions as to SEQRA (generally), the Town Code, Town Law, Open Meetings Law, Town Board Procedures and the Community Benefits Package have been disposed of, either by the decision of this Court or the decision of the Court in the Nassau Action, and will not be revisited here.

That leaves the Court with the important question of whether Respondent-Defendant BROOKHAVEN TOWN BOARD's adoption of the SEQRA Resolution

was arbitrary and capricious, and therefore null, void and of no force and effect. The instant issue, considering the disposal of all other SEQRA matters settled herein above and in the Nassau Action, narrows the inquiry to the manner in which Respondent-Defendant BROOKHAVEN TOWN BOARD adopted the SEQRA Resolution, and whether that "re-vote" violated well settled law.

Some have argued that Respondent-Defendant BROOKHAVEN TOWN BOARD, in discharging its duties herein, was acting in a legislative capacity, while Petitioners-Plaintiffs maintain that it was conducting itself in an administrative capacity in adopting the SEQRA Resolution disputed in this matter. In Respondent-Defendant BROOKHAVEN TOWN BOARD's Memorandum of Law dated September 22, 2006, at page 10, the case of *Kelsky v Lewisboro* is cited in support of the argument that Petitioners-Plaintiffs herein lack standing to challenge the granting of the special permit relevant to the Caithness Project, and said citation begins with the words, *"Generally to establish standing to review an administrative determination. . ."*. Furthermore, Justice Cozzens, in rendering his decision in the Nassau Action, writes, in the portion granting Petitioners-Plaintiffs standing pursuant to SEQRA, *"The opponent of the administrative action in a SEQRA proceeding. . ."*. Still further, the Appellate Division, Second Department, in *Green v LoGrande*, 96 AD2d 524, 464 NYS2d 831 [1983], states, in relevant part, *"The administrative authority, be it a town board or a zoning board of appeals, is required to grant a special use permit. . ."*; and in *Holbrook Associates Development Co v McGowan*, 261 AD2d 620, 690 NYS2d 686 [1999], again discusses

the requirement of administrative authority to grant a special use permit, regarding the Town Board. It is well settled law in New York that Town Boards have both legislative and administrative authority, and that in rendering decisions regarding special permit applications and the SEQRA review requisite thereto, Town Boards are acting exclusively in their distinct administrative capacity.

That brings this review to the question of whether the June 6, 2006, vote of the Town Board, regarding the SEQRA Resolution, was a denial or not, some having argued that it was not. First, the Court notes, as set forth in the Statement of Facts herein above, that Supervisor Foley, following said vote, properly acknowledged that said Resolution had been defeated, and further correctly determined that this disallowed action on the Special Permit Resolution. The Court of Appeals, in *Tall Trees Const Corp v Zoning Board of Appeals of the Town of Huntington*, 97 NY2d 86, 761 NE2d 565, 735 NYS2d 873 [2001], ruled, "*We conclude that when a quorum of the Board is present and participates in a vote on an application, a vote of less than a majority of the Board is deemed a denial*", when there was a tie vote. In rendering that decision, the Court of Appeals cited the Appellate Division, Fourth Department's decision in *Monro Muffler/Brake, Inc v Town Board of the Town of Perinton*, 222 AD2d 1069 (4 Dept 1995), wherein the Appellate Division ruled that, "*Supreme Court properly determined that the failure of respondent to approve by a majority vote the application of petitioner. . . for a special use permit. . . constituted a valid determination to deny the application.*". It is clear to this Court that the SEQRA Resolution regarding the Caithness Pro-

ject was denied by the majority vote against its approval on June 6, 2006. Therefore, its reconsideration on July 25, 2006, was indisputably a re-vote, and not, as set forth in Respondent-Defendant BROOKHAVEN TOWN BOARD's Memorandum of Law dated September 22, 2006, at page 29, that "*the board simply did not have enough votes to approve the SEQRA findings.*".

It is well settled that, as SEQRA does not contain provisions addressing judicial review, Courts must adhere to the standards generally applicable to administrative proceedings, in that an agency's determination must be sustained unless the Court concludes it was made in violation of lawful procedure, was affected by an error of law, or was arbitrary and capricious or an abuse of discretion *(See, Responsible Southtown Development v Roosevelt Island Operating Corp*, 735 NYS2d 83 [1 Dept 2001]). In arriving at that conclusion, this Court is also aware that literal compliance with both the letter and spirit of SEQRA is required, and mere substantial compliance will not suffice *(See, Golten Marine Co, Inc v NYS Department of Environmental Conservation*, 193 AD2d 742, 598 NYS2d 59 [2 Dept 1993]; *Group for S. Fork v Wines*, 190 AD2d 794; *Holmes v Brookhaven Town Planning Board*, 137 AD2d 601, *quoting Inland Vale Farm Co v Stergianopoulos*, 104 AD2d 395, *aff'd* 65 NY2d 718; *EFS Venture Corp v Foster*, 71 NY2d 359).

As pointed out by Petitioners-Plaintiffs, the Appellate Division, Second Department recently confirmed, in *Corona Realty Holdings, LLC v Town of North Hempstead*, 32 AD3d 393, 820 NYS2d 102 [2006], that the determination of an administrative

agency that neither adheres to its own prior precedent, nor indicates its reason for reaching a different result on essentially the same facts, is on its face arbitrary and capricious *(See, Field Delivery Service*, 66 NY2d 516, 488 NE2d 1223, 498 NYS2d 111; Al *Turi Landfill v NYS Department of Environmental Conservation*, 289 AD2d 231, 735 NYS2d 61, *affd* 98 NY2d 758, 781 NE2d 892, 751 NYS2d 827); and an agency's failure to provide a valid and rational explanation for the departure from its prior precedent mandates reversal, even though substantial evidence may exist in the record to otherwise support the determination *(See, Al Turi Landfill v NYS Department of Environmental Conservation, supra; Field Delivery Service, supra)*.

As also pointed out by Petitioners-Plaintiffs, the Appellate Division, Second Department has remained on this track, ruling in *Campo Grandchildren Trust v Colson*, 2007 NY Slip Op 03302, decided on April 17, 2007, that the determination of a zoning board of appeals cannot be sustained if it lacks a rational basis and is arbitrary and capricious *(See, Fuhst v Foley*, 45 NY2d 441, 410 NYS2d 56, 382 NE2d 756; *Greenfield v Board of Appeals of Village of Massapequa Park*, 21 AD3d 556, 800 NYS2d 728; *Crystal Pond Homes v Prior*, 305 AD2d 595, 759 NYS2d 366); a determination of a zoning board of appeals that neither adheres to its own precedent nor indicates its reason for reaching a different result on essentially the same facts is arbitrary and capricious *(See, Knight v Amelkin*, 68 NY2d 975, 510 NYS2d 550, 503 NE2d 106, *quoting Field Delivery Service, supra; Corona Realty Holdings, LLC v Town of North Hempstead, supra)*, mandating reversal, even if there may otherwise be evidence in

the record sufficient to support the determination *(See, Corona Realty Holdings, LLC v Town of North Hempstead, supra)*.

This Court further notes that compliance with these requirements is not onerous. It is further well settled that the Courts in New York have accorded great deference to the explanations offered by boards for their contrary determinations under similar circumstances, as well as to changes in policy *(See, Hawryluk v Zoning Board of Appeals of the Town of Huntington*, 173 AD2d 826, 571 NYS2d 53 [2 Dept 1991]; *Ciampa v Hudson*, 158 AD2d 925, 551 NYS2d 89 [4 Dept 1990]; *Pesek v Hitchock*, 156 AD2d 690, 549 NYS2d 164 [2 Dept 1989]; *Knight v Amelkin, supra)*. The Appellate Division, Second Department, recently confirmed that the Courts will generally defer to the explanation for reaching a different result on similar facts, sustaining the determination because a rational explanation for reaching the different result on similar facts was provided *(See, Berk v McMahon*, 29 AD3d 902, 814 NYS2d 753 [2 Dept 2006], *citing Knight v Amelkin, supra)*.

That leaves this Court confronted with the inescapable fact that the transcript submitted by Respondents-Defendants BROOKHAVEN and BROOKHAVEN TOWN BOARD demonstrates that the SEQRA Resolution was brought up in the public session of the July 25, 2006 meeting, was properly reintroduced by a waiver of the Rules of Procedure, but then adopted with the same language, absent an explanation in the SEQRA Resolution for the adoption (as opposed to the prior denial), and without any discussion on the record prior to said adoption.

This does not meet the standards set forth clearly herein above, as promulgated by both the Appellate Division and Court of Appeals, and thus fails to meet the standard of literal compliance with both the letter and spirit of SEQRA.

Therefore, the Fifth Claim for Relief must be granted, solely to the extent that the adoption of the SEQRA Resolution by re-vote of Respondent-Defendant BROOKHAVEN TOWN BOARD, devoid of the requisite explanation for reaching the different result (passage as opposed to rejection), renders said action arbitrary and capricious, resulting in the declaration of said SEQRA Resolution null, void and of no force and effect, and requiring, pursuant to Article 78, that it be remanded to Respondent-Defendant BROOKHAVEN TOWN BOARD for proper action.

The Court notes here, as will be set forth further herein below (and in the companion decision regarding the Article 78 proceeding by these Petitioners-Plaintiffs against Respondent-Defendant BROOKHAVEN's Planning Board), that the annulment of the SEQRA Resolution brings with it the nullification of the Special Permit Resolution adopted by Respondent-Defendant BROOKHAVEN TOWN BOARD, because it was premised upon said SEQRA Resolution, as well as the nullification of the Site Plan approval (but not the SEQRA Resolution) of Respondent-Defendant BROOKHAVEN's Planning Board, because it was also premised upon both the SEQRA Resolution (and the Special Permit Resolution) of Respondent-Defendant BROOKHAVEN TOWN BOARD (in short, a domino effect).

Sixth Claim for Relief:

The Sixth Claim for Relief, pursuant to CPLR 3001, requests that the Court declare such matters concerning the lawfulness of the procedures preceding consideration and adoption of, as well as concerning the adoption and the lawfulness of, Resolutions I and II, the FEIS, the Findings Statement, the "revote", and all other actions taken by or on behalf of Respondent-Defendant BROOKHAVEN TOWN BOARD to approve the Caithness Project which are necessary to result in full, complete and just resolution of all claims and controversies among the parties relating to such matters, granting permanent injunctive relief barring Respondents-Defendants from carrying out, implementing or otherwise acting to implement or carry out Resolutions I and II or otherwise construct the Caithness Project;

The issues of SEQRA, generally, including the FEIS, were all disposed of by the decision rendered in the Nassau Action, as stated herein above. The issue of the Special Permit Resolution was disposed of by the decision herein above, to the extent of Petitioners-Plaintiffs standing to challenge same. The Nassau Action granted them standing to challenge the SEQRA procedures, while ruling against them on the specifics, but that same grant of standing allowed them to challenge the instant and separate SEQRA actions of Respondents-Defendants BROOKHAVEN and BROOKHAVEN TOWN BOARD, and the manner of adoption by Respondent-Defendant BROOKHAVEN TOWN BOARD of the SEQRA Resolution.

The odd manifestation of the situation at hand is that, although lacking standing to challenge the Spe-

cial Permit Resolution, as determined herein above, their success in challenging the manner of adoption of the SEQRA Resolution, as determined pursuant to the immediately prior Claim for Relief, serves to annul the Special Permit Resolution, as it cannot stand without a properly adopted SEQRA Resolution.

Furthermore, in the related action against Respondent-Defendant BROOKHAVEN's Planning Board, while Petitioners-Plaintiffs lack standing to challenge same pursuant to their failure to demonstrate they are within the zone of interest or suffer injury different from the general public, their right to challenge pursuant to SEQRA, and the resultant nullification of Respondent-Defendant BROOKHAVEN TOWN BOARD's action, deprives the Planning Board of the ability to take action to approve the site plan, for lack of a properly adopted Special Permit, and therefore renders the actions of Respondent-Defendant BROOKHAVEN's Planning Board a nullity, void and of no force and effect.

Therefore, the Sixth Claim for Relief must be granted, solely to the extent that both the SEQRA Resolution and the Special Permit Resolutions, as well as the Site Plan Resolution of the Respondent-Defendant BROOKHAVEN's Planning Board, as they currently stand, are null, void and of no force and effect.

PETITIONERS-PLAINTIFFS' ORDER
TO SHOW CAUSE:

Petitioners-Plaintiffs Order to Show Cause was brought before this Court (001) for an Order and Judgment granting various relief, premised upon the above discussed Petition-Complaint.

First, pursuant to CPLR Article 78, Petitioners-Plaintiffs seek to cancel, annul and invalidate the Resolution of Respondent-Defendant BROOKHAVEN TOWN BOARD approving the Special Permit for construction of the 350 megawatt electrical generating plant by Respondent-Defendant CAITHNESS. Petitioners-Plaintiffs achieve this result, by way of their challenge to the requisite SEQRA Resolution upon which the Special Permit Resolution was adopted, even though they lacked standing to directly challenge approval of the Special Permit, as set forth herein above.

Second, pursuant to CPLR Article 78, Petitioners-Plaintiffs seek to annul and invalidate the Resolution of Respondent-Defendant BROOKHAVEN TOWN BOARD, rendered under the State Environmental Quality Review Act (SEQRA), approving the Finding Statement, accepting the FEIS for the Caithness Project promulgated and adopted by Respondent-Defendant LIPA, acting as "lead agency". Petitioners-Plaintiffs directly achieved this result, due to the manner of adoption of the SEQRA Resolution, as set forth herein above in this decision, having standing to challenge pursuant to SEQRA, as set forth in the Nassau Action, with the concurrence of this Court.

Third, Petitioners-Plaintiffs seek to cancel, annul and invalidate all other Resolutions, actions and authorizations granted by Respondent-Defendant BROOKHAVEN TOWN BOARD and/or Respondent-Defendant BROOKHAVEN, for the Caithness Project. Lacking specification upon which this Court can determine the relief Petitioners-Plaintiffs seek in this catch all, same must be denied.

Fourth, pursuant to CPLR 3001, Petitioners-Plaintiffs seek Judgment declaring such other matters with respect to the lawfulness of the procedures undertaken, the adoption of, the effectiveness and implementation of the above referenced Resolutions by Respondent-Defendant BROOKHAVEN TOWN BOARD and/or Respondent-Defendant BROOKHAVEN, with reference to the Caithness Project, as may be required to fully adjudicate the claims and controversies recited herein. This is a restatement of the Sixth Claim for Relief, which has already been adjudicated to the extent set forth herein above.

Fifth, Petitioners-Plaintiffs seek to enjoin Respondents-Defendants from implementing any approvals authorizing the construction or implementation of the Caithness Project. Having succeeded in nullification of the approvals herein, this further relief is moot and unnecessary, and same must be denied.

Sixth, Petitioners-Plaintiffs seek the costs and disbursements hereof. There being no showing that Respondents-Defendants' actions were wilful or contumacious, same must be denied.

PETITIONERS-PLAINTIFFS' MOTION:

Petitioners-Plaintiffs Motion (006) for an Order staying the Resolutions and restraining Respondent-Defendant CAITHNESS from undertaking any action in furtherance of the construction of the proposed 350 megawatt electric generating facility in the Hamlet of Yaphank, Town of Brookhaven, County of Suffolk, State of New York, pursuant to said Resolutions and the Site Plan approval of Respondent-Defendant BROOKHAVEN's Planning Board, pending determination of this matter and the related Article 78 against said Planning Board, is hereby dismissed as moot, in light of the above determination that the SEQRA and Special Permit Resolutions (and hence the Planning Board Site Plan Resolution) are null, void and of no force and effect.

For all the reasons stated herein above and in the totality of the papers submitted herein, it is, therefore,

ORDERED, that regarding Petitioners-Plaintiffs' underlying Combined Petition-Complaint:

1. As to the First Claim for Relief, asserting Respondent-Defendant BROOKHAVEN TOWN BOARD violated Town Law and the Town Code in adopting the Special Permit Resolution, this Court has determined that Petitioners-Plaintiffs lack standing to bring this Claim for Relief, and therefore the First Claim for Relief is hereby denied in all respects;

2. As to the Second Claim for Relief, asserting Respondent-Defendant BROOKHAVEN TOWN BOARD violated SEQRA in adopting these Resolutions, this Court has determined that:

a. Petitioners-Plaintiffs lack standing to bring this Claim for Relief as to the Special Permit Resolution;

b. Petitioners-Plaintiffs have standing to challenge pursuant to SEQRA, having been previously determined intheNassau Action, and may contest Respondent-Defendant BROOKHAVEN TOWN BOARD's adoption of their SEQRA Resolution;

c. Petitioners-Plaintiffs may not re-litigate herein the issues of impermissible segmentation and failure to prepare and adopt a SEIS, same having been determined against them in the Nassau Action; and therefore, the Second Claim for Relief is hereby granted solely to the extent of Petitioners-Plaintiffs standing to challenge pursuant to SEQRA herein, and is hereby denied in all other respects;

3. As to the Third Claim for Relief, asserting that, Respondent-Defendant LIPA having violated SEQRA, Public Authorities Law § 1020-ff(aa) and State Finance Law § 123-b in its SEQRA determination and approval of the PPA, the subsequent adoption of the Special Permit Resolution and the SEQRA Resolution by Respondent-Defendant BROOKHAVEN TOWN BOARD, premised thereupon, is therefore unlawful, this Court has determined that:

a. Petitioners-Plaintiffs lack standing to bring this Claim for Relief as to the Special Permit Resolution;

b. Petitioners-Plaintiffs may not re-litigate herein the remainder of the issues raised in

this Claim for Relief, same having been determined against them in the Nassau Action;

and therefore , the actions of Respondent-Defendant LIPA having been validated by the decision in the Nassau Action, the Third Claim for Relief is hereby denied in all respects;

4. As to the Fourth Claim for Relief, asserting Respondent-Defendant BROOKHAVEN TOWN BOARD violated SEQRA, Open Meetings Law (Public Officers Law Article 7), Town Law, the Town Code, Town Board Procedures, and engaged in "contract zoning", in adopting the Special Permit Resolution and the SEQRA Resolution, this Court has determined that:

   a. Petitioners-Plaintiffs lack standing to bring this Claim for Relief as to the Special Permit Resolution, including the allegations of "contract zoning" and violations of Town Law and the Town Code;

   b. Petitioners-Plaintiffs may not re-litigate herein the general assertions of SEQRA violations herein, same having been determined against them in the Nassau Action;

   c. Petitioners-Plaintiffs have not proffered substantive allegations in support of the assertion that the Open Meetings Law has been violated;

   d. Respondent-Defendant BROOKHAVEN TOWN BOARD did not violate their Rules of Procedure, as clearly demonstrated by the transcript of their July 25, 2006 meeting;

and therefore, the Fourth Claim for Relief is hereby denied in all respects;

5. As to the Fifth Claim for Relief, asserting Respondent-Defendant BROOKHAVEN TOWN BOARD violated SEQRA, the Town Code, Town Law, Open Meetings Law (Public Officers Law Article 7), Town Board Procedures, and various others laws, conducting themselves in an *ultra vires* manner, in adopting the SEQRA Resolution by the holding of a "re-vote" and considering a Community Benefits Package without legal authority; this Court has determined that:

   a. The issues of SEQRA (generally), the Town Code, Town Law, Open Meetings Law, Town Board Procedures and the Community Benefits Package, have been disposed of, either by the decision of this Court herein, or the decision of the Court in the Nassau Action, and need not be restated;

   b. Petitioners-Plaintiffs sustained their allegations challenging adoption of the SEQRA Resolution by Respondent-Defendant BROOKHAVEN TOWN BOARD on July 25, 2006, as set forth herein above in the body of this decision;

   and therefore, the Fifth Claim for Relief is hereby granted to the extent that the adoption of the SEQRA Resolution by Respondent-Defendant BROOKHAVEN TOWN BOARD is arbitrary and capricious, and therefore null, void and of no force and effect, and is hereby further remanded to Respondent-Defendant BROOKHAVEN TOWN BOARD for proper action, and is hereby denied in all other respects;

6. As to the Sixth Claim for Relief, pursuant to CPLR 3001, requesting declaratory judgment concerning:

   (i) the lawfulness of procedures preceding consideration and adoption of, as well as concerning the adoption and lawfulness of, the Special Permit Resolution and the SEQRA Resolution, the FEIS, the Findings Statement, the "re-vote", and all other actions taken by or on behalf of Respondents-Defendants BROOKHAVEN and BROOKHAVEN TOWN BOARD to approve the Caithness Project, necessary for full, complete and just resolution of all claims and controversies among the parties relating thereto; and

   (ii) permanent injunctive relief barring Respondents-Defendants from carrying out, implementing or otherwise acting to implement or carryout the Special Permit Resolution and the SEQRA Resolution or otherwise construct the Caithness Project;

   this Court notes that:

   a. The issues of SEQRA, generally, including the FEIS, were determined and disposed of by the decision rendered in the Nassau Action, as stated herein above;

   b. The issue of the Special Permit Resolution was determined and disposed of by the decision herein above, to the extent that Petitioners-Plaintiffs lack standing to challenge same;

c. The issue of Petitioners-Plaintiffs' standing to challenge, pursuant to SEQRA, was determined and granted by the decision rendered in the Nassau Action (while ruling against them on the specifics), which in turn determined their standing to challenge the instant and separate SEQRA actions of Respondents-Defendants BROOKHAVEN and BROOKHAVEN TOWN BOARD, and the manner of adoption of the SEQRA Resolution by said Respondent-Defendant;

and therefore, the Sixth Claim for Relief must be granted, to the extent that:

1. The SEQRA Resolution is hereby declared null, void and of no force and effect; and
2. The Special Permit Resolutions is hereby declared null, void and of no force and effect, because a valid SEQRA determination must be adopted prior to its approval;
3. The Site Plan Resolution of Respondent-Defendant BROOKHAVEN's Planning Board is hereby declared null, void and of no force and effect, because a valid Special Permit approval must be adopted by Respondent-Defendant BROOKHAVEN TOWN BOARD prior to its approval;

and it is further

ORDERED, therefore, that regarding Petitioners-Plaintiffs' Order to Show Cause (001):

a. Judgment and Order, pursuant to CPLR Article 78, cancelling annulling and invalidating the Special Permit Resolution, with waivers and vari-

ances, adopted by Respondent-Defendant BROOKHAVEN TOWN BOARD, on July 25, 2006, is granted for the reasons set forth herein above;

b. Judgment and Order, pursuant to CPLR Article 78, annulling and invalidating the SEQRA Resolution of Respondent-Defendant BROOKHAVEN TOWN BOARD, dated July 25, 2006, is granted for the reasons set forth herein above;

c. Judgment and Order cancelling, annulling and invalidating all other Resolutions, actions and authorizations granted by Respondent-Defendant BROOKHAVEN TOWN BOARD and/or Respondent-Defendant BROOKHAVEN, for the purpose of authorizing and implementing the Caithness Project, is hereby denied for lack of specificity as to the relief sought;

d. Judgment and Order, pursuant to CPLR 3001, granting Declaratory Judgment in favor of Petitioners-Plaintiffs as to matters with respect to the lawfulness of the procedures undertaken, the adoption of, the effectiveness and implementation of Special Permit Resolution, the SEQRA Resolution and all other actions and authorizations granted by Respondent-Defendant BROOKHAVEN TOWN BOARD and/or Respondent-Defendant BROOKHAVEN with reference to the Caithness Project as may be required to fully adjudicate the claims and controversies recited herein, is granted solely to the specific extent set forth herein above in this decision;

e. Judgment and Order granting a permanent injunction in favor of Petitioners-Plaintiffs enjoining Respondents-Defendants from imple-

menting any approvals authorizing construction or implementation of the Caithness Project, is hereby dismissed as same has been rendered moot by the decision herein;

f. Judgment and Order granting Petitioners-Plaintiffs the costs and disbursements hereof, is hereby denied, as there has been no showing that the actions of Respondents-Defendants were wilful or contumacious;

and it is further.

ORDERED, that the Motion (003) of Respondent-Defendant LIPA for an Order, pursuant to CPLR 3211(a) (1), (3), (4), (5) and (7), dismissing Petitioners-Plaintiffs' Sixth Claim for Relief asserted in the Petition-Complaint, is hereby denied in all respects; and it is further

ORDERED, that the Motion (002) of Respondent-Defendant CAITHNESS for an Order, pursuant to 22 NYCRR § 130-1.1, imposing sanctions (in the form of litigation costs and attorney's fees) on Petitioners-Plaintiffs and their Counsel; and pursuant to CPLR 3211(a) (1),) (3), (4), (5) and (7), dismissing the Sixth Claim for Relief asserted in Petitioners-Plaintiffs' Petition-Complaint, which seeks declaratory relief under CPLR 3001 and related injunctive relief; is hereby denied in all respects.

Dated: Riverhead, New York
May 22, 2007

/s/ HON. JEFFREY ARLEN SPINNER
Hon. Jeffrey Arlen Spinner, J.S.C.

✓ Final Disposition	Non-Final Disposition
✓ Scan	Do Not Scan

TO:

ROSENBERG CALICA & BIRNEY, LLP
Attorneys for Petitioners-Plaintiffs
100 Garden City Plaza, Suite 408
Garden City, New York 11530

DEVITT SPELLMAN BARRETT, LLP
Attorney for Respondents-Defendants BROOKHAVEN
50 Route 111
Smithtown, New York 11787

BEVERIDGE & DIAMOND, PC
Attorneys for Respondent-Defendant CAITHNESS
477 Madison Avenue, 15th Floor
New York, New York 10022

CARTER LEDYARD & MILBURN LLP
Attorneys for Respondent-Defendant LIPA
2 Wall Street
New York, New York 10005-2072

RIVKIN RADLER, LLP
Attorneys for Respondent-Defendant LIPA
926 Reckson Plaza
Uniondale, New York 11556-0926

WESTERMAN BALL EDERER MILLER
& SHARFSTEIN, LLP
Attorneys for Respondent-Defendant
CAITHNESS
170 Old Country Road, Suite 400
Mineola, New York 11501

SUPREME COURT OF THE
STATE OF NEW YORK

IAS PART XXI - COUNTY OF SUFFOLK

PRESENT:

HON. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

INDEX NO. 2007-17956

MOTION SEQ. NO.: 001 - CASEDISP
ORIG. MOTION DATE: 07/11/07

MOTION SEQ. NO.: 002 - Mot D
ORIG. MOTION DATE: 07/18/07

MOTION SEQ. NO.: 003 - Mot D
ORIG. MOTION DATE: 07/25/07

MOTION SEQ. NO.: 004 - Mot D
ORIG. MOTION DATE: 07/25/07

FINAL SUBMIT DATE: 08/15/07

EAST END PROPERTY COMPANY #1 LLC, MARK KASPIEV, JOHN MCCONNELL, JOHAN MCCONNELL, DONALD SEUBERT, PATRICIA SEUBERT, FRANCESCA HURLEY, MICHAEL HURLEY, LAURENCE EINUS, EMILY KARLOVITS, STEPHEN HENRY, THE YAPHANK TAXPAYERS AND CIVIC ASSOCIATION, INC and SOUTH YAPHANK CIVIC ASSOCIATION,

Petitioners-Plaintiffs,

—against—

TOWN BOARD OF THE TOWN OF BROOKHAVEN; PLANNING BOARD OF THE TOWN OF BROOKHAVEN, THE TOWN OF BROOKHAVEN and CAITHNESS LONG ISLAND, LLC,

Respondents-Defendants,

—and—

LONG ISLAND POWER AUTHORITY,

Additional Respondent-Defendant.

(CPLR 1001[A])

UPON the following papers numbered 1 to 337 read on these Motions:

- Petitioners-Plaintiffs' Order to Show Cause & Petition-Complaint (001) (Pages 1-104 & Exhibits 1-3, A-H & A-B);
- Respondent-Defendant CAITHNESS' Opposition (Pages 105-146 & Exhibits A-O);
- Respondent-Defendant BROOKHAVEN's Opposition (Pages 147-154);
- Respondent-Defendant LIPA's Opposition (Pages 155-169 & Exhibits A-C);
- Respondent-Defendant BROOKHAVEN's Answer (Pages 170-200 & Exhibits 1-3);
- Respondent-Defendant LIPA's Answer (Pages 201-240);
- Petitioners-Plaintiffs' Reply (Pages 241-275 & Exhibits A-I);

- Respondent-Defendant LIPA's Motion (002) (Pages 276-292);
- Respondent-Defendant BROOKHAVEN's motion (003) (Pages 293-298 & Exhibits A-D);
- Respondent-Defendant CAITHNESS' Motion (004) (Pages 299-337 & Exhibits A-J); it is,

ORDERED, that the application Petitioners-Plaintiffs (001) is hereby denied in all respects, the Petition-Complaint is hereby dismissed and the action disposed; and the applications of LIPA (002), BROOKHAVEN (003) & CAITHNESS (004) are hereby dismissed as moot, in light of this Court's decision regarding Petitioners-Plaintiffs' application herein.

Petitioners-Plaintiffs move this Court (001) for an Order and Judgment:

a. On the First Claim for Relief, pursuant to CPLR Article 78, cancelling, annulling and invalidating a certain Resolution of Respondent-Defendant BROOKHAVEN TOWN BOARD granted on June 5, 2007, pursuant to SEQRA (State Environmental Quality Review Act, ECL § 8-101, *et. seq*), by adopting a SEQRA Finding Statement for a proposed 350 megawatt electrical generating plant, to be constructed by Respondent-Defendant CAITHNESS, on an approximately 96 acre parcel located in the Hamlet of Yaphank. Town of Brookhaven, New York (the Caithness Project) (herein after the SEQRA Resolution);

b. Upon the Second Claim for Relief, pursuant to CPLR Article 78, cancelling, annulling and invalidating a certain Resolution of Respondent-Defendant BROOKHAVEN TOWN BOARD dated

June 5, 2007, which, *inter alia*, approved the Caithness Project and substantial variances and waivers from established zoning requirements (herein after the Zoning Resolution);

c. Upon the Third Claim for Relief, pursuant to CPLR Article 78, cancelling, annulling and invalidating all other Resolutions, actions and authorizations granted by Respondents-Defendants BROOKHAVEN TOWN BOARD and/or PLANNING BOARD for the purpose of authorizing and implementing the Caithness Project;

d. Upon the Fourth Claim for Relief, pursuant to CPLR 7805, staying enforcement of the SEQRA Resolution, and enjoining and restraining Respondents-Defendants CAITHNESS and LIPA from proceeding with any additional construction or development of the Caithness Project pursuant to the Resolutions challenged herein;

e. Upon the Fifth Claim for Relief/Cause of Action, pursuant to CPLR 3001, granting a judgment in favor of Petitioners-Plaintiffs declaring such other matters with respect to the lawfulness of the procedures undertaken, the adoption of, the effectiveness, and implementation of the SEQRA Resolution, the Zoning Resolution, and all other actions and authorizations granted by Respondents-Defendants BROOKHAVEN with reference to the Caithness Project as may be required to fully adjudicate the claims and controversies recited herein;

f. Granting Petitioners-Plaintiffs the costs and disbursements of this proceeding.

Petitioners-Plaintiffs' above cited application by Order to Show Cause is filed upon their Petition-Complaint, which sets forth the above stated Claims for Relief, as follows:

1. The First Claim for Relief alleges Respondent-Defendant BROOKHAVEN TOWN BOARD violated the requirements of law and Decisions, because the environmental record before it was identical to that upon which it had previously refused to adopt identical SEQRA Findings on June 6, 2006, and upon which it purported to reverse its decision and approve the same SEQRA Findings on July 26, 2006, and again on June 5, 2007, therefore making their adoption of the SEQRA Resolution regarding the Caithness Project arbitrary, capricious and illegal, necessitating it be cancelled, annulled and declared of no force and effect, in that no change in the Caithness Project nor its environmental impacts were set forth, nor any other rationale for reaching a different result;

2. The Second Claim for Relief alleges that, by reason of the foregoing, Respondent-Defendant BROOKHAVEN TOWN BOARD's adoption of the Zoning Resolution on June 5, 2007, which approved the Special Permit, Variances and Waivers for the Caithness Project, must also be cancelled, annulled, declared arbitrary and capricious and invalidated upon the same grounds;

3. The Third Claim for Relief alleges any Site Plan Resolution adopted by Respondent-Defendant BROOKHAVEN PLANNING BOARD granting approval for the Caithness Project must be annulled, declare arbitrary, capricious, unlawful,

void and of no further effect upon the same grounds;

4. The Fourth Claim for Relief alleges that, pursuant to CPLR 7805, the Court should stay further actions or substantial construction activities, enjoining Respondents-Defendants from conducting any further construction thereof:

5. The Fifth Claim for Relief alleges, by reason of the foregoing, a justiciable controversy has arisen, and currently exists, concerning the lawfulness of the SEQRA, Zoning and Site Plan Resolutions, and the procedures and proceedings upon which same are based, and therefore the Court should grant a Judgment, pursuant to CPLR 3001, as may be necessary in order to fully and fairly adjudicate all claims, controversies and disagreements of the parties concerning such Resolutions;

6. The Sixth Claim for Relief alleges to reserve Petitioners-Plaintiffs' full appellate rights to the Decisions, reasserting their prior claims in a prior action, herein, and seeking to have Respondents-Defendants BROOKHAVEN's 2007 Resolutions declared annulled.

Respondent-Defendant LIPA moves this Court (002) for an Order, pursuant to CPLR 3211(a)(1), (3) and (7), dismissing Petitioners-Plaintiffs' Fifth and Sixth Claims for Relief asserted in the Combined Article 78 Petition and Complaint in the above captioned action, on the grounds that Petitioners-Plaintiffs' claims are disproved by documentary evidence, they lack legal capacity to sue and the pleadings fail to state a cause of action.

Respondents-Defendants BROOKHAVEN move this Court (003) for an Order, pursuant to CPLR 3211(a)(1), (3) and (7), dismissing the Fifth and Sixth Claims for Relief contained in Petitioners-Plaintiffs' Combined Verified Petition and Complaint.

Respondent-Defendant CAITHNESS moves this Court (004) for an Order, pursuant to CPLR 3211(a)(1), (3) and (7), dismissing the Fifth Claim for Relief contained in Petitioners-Plaintiffs' Combined Verified Petition and Complaint dated June 12, 2007, dismissing the Sixth Claim for Relief therein to the extent it seeks declaratory or other relief apart from CPLR Article 78.

INCORPORATION OF RECORDS
OF PRIOR PROCEEDINGS:

For the purposes of clarity and information, ONLY, the Court hereby incorporates herein the full records of the two prior proceedings regarding this matter, under Suffolk County Index Numbers 2006-23201 and 2006-29596, including all submissions made and decisions rendered in said matters.

INTRODUCTION:

As in the last proceeding involving this matter, under Index Number 2006-23201, this is a "hybrid" action, seeking relief by way of a special proceeding pursuant to CPLR Article 78, as well as a declaratory judgment pursuant to CPLR Article 30, § 3001, and injunctive relief. Petitioners-Plaintiffs seek a review of the actions of Respondents-Defendants, most particularly Respondents-Defendants BROOKHAVEN.

Petitioners-Plaintiffs seek to have said review invalidate, declare unlawful, arbitrary and capricious, annul, void and in all respects render of no force and effect, the actions of Respondents-Defendants, culminating in adoption of two resolutions by Respondent-Defendant BROOKHAVEN TOWN BOARD on June 5, 2007, regarding approvals of a SEQRA determination and a special use permit for a 350 megawatt electric generating plant in the Hamlet of Yaphank, Town of Brookhaven, County of Suffolk and State of New York, known herein as the Caithness Project.

STATEMENT OF FACTS:

Respondent-Defendant LIPA selected Respondent-Defendant CAITHNESS to provide a state-of-the-art electric generating facility, which Respondent-Defendant CAITHNESS proposes to construct on a 15 acre portion of a 96 acre parcel, located as identified herein above, said land being zoned "L-1", light industry by Respondents-Defendants BROOKHAVEN prior to any action herein; said 15 acre portion being located within an Empire Development Zone, also established prior to any action taken herein.

Respondent-Defendant LIPA took on the status of "lead agency", pursuant to SEQRA (6 NYCRR § 617.2(u)], in order to perform a review of the potential environmental impacts of construction and operation of such a facility, prior to selection of the present site. After it was chosen, Respondents-Defendants BROOKHAVEN worked with Respondent-Defendant LIPA, as an "involved agency", to scope the Environmental Impact Statement, that

process being concluded on December 4, 2005, after which several of the Petitioners-Plaintiffs herein instituted the Nassau Action against several of the Respondents-Defendants herein, regarding said SEQRA process. That litigation did not, and could not, include Respondents-Defendants BROOKHAVEN. During that time, Respondents-Defendants LIPA and BROOKHAVEN began negotiating a Community Benefits Package which consisted principally of Payment-In-Lieu-Of-Taxes (PILOTs).

The L-1 zoning district of Respondents-Defendants BROOKHAVEN only permits electric generating facilities by the granting of a special permit by Respondent-Defendant BROOKHAVEN TOWN BOARD, subject to criteria set forth in various sections of the Town Code. Pursuant to § 85-31 of said Town Code, Respondent-Defendant CAITHNESS applied for such special permit, with requests for variances from certain requirements within that zoning district, including an exhaust stack height of 170 feet (exceeding the Town Code imposed limitation of 125 feet) and a building height of 80 feet (exceeding the Town Code imposed limitation of 50 feet).

On March 9, 2006 and April 25, 2006, public hearings regarding said application were held by Respondent-Defendant BROOKHAVEN TOWN BOARD, each allegedly lasting about five hours. Presentations were made by representatives of Respondents-Defendants LIPA and CAITHNESS, and testimony was taken in opposition (including several Petitioners-Plaintiffs herein) and in support. Further presentations, discussions and comments continued through several other meetings and work sessions of Respondent-Defendant BROOKHAVEN TOWN BOARD,

with resolutions approving the SEQRA determination and special permit being carried forward on said Respondent-Defendant's Agenda throughout this time period.

On June 6, 2006, with all the members of Respondent-Defendant BROOKHAVEN TOWN BOARD present, the resolution approving the SEQRA determination, as set forth in the FEIS adopted by Respondent-Defendant LIPA, was voted upon, with four members voting no, and three voting yes. On July 25, 2006, Respondent-Defendant BROOKHAVEN TOWN BOARD passed a number of resolutions regarding the Caithness Project, including:

1. Resolution by Councilwoman Walsh, seconded by Councilwoman Kepert, pursuant to Town Board Rules of Procedure, Article II, Section 3, Subsection A5, to waive the 90 day requirement before reintroduction of the SEQRA Resolution of June 6, 2006, for acceptance and adoption of the Findings Statements: adopted by a vote of 5-2;

2. Resolution by Councilwoman Walsh, seconded by Councilwoman Kepert, to accept the SEQRA Resolution of June 6, 2006, for acceptance and adoption of the Findings Statements, which was adopted by a vote of 5-2 after a Motion to Table, by Councilman McCarrick, seconded by Councilwoman Bissonette: defeated by a vote of 2-5;

3. Resolution by Councilwoman Kepert, seconded by Councilman Fiore-Rosenfeld, to take out of order from the Decision Pending Agenda, the resolution to approve the special permit application

for the Caithness Project, with variances and waivers: adopted by a vote of 5-2;

4. Resolution by Councilwoman Kepert, seconded by Councilman Fiore-Rosenfeld, to approve the special permit application for the Caithness Project, with variances and waivers: adopted by a vote of 5-2;

Councilwoman Walsh, who moved the waiver of the 90 day rule and the reconsideration of the SEQRA resolution that had been previously defeated, had voted against approval of said resolution at the June 6, 2006 meeting of Respondent-Defendant BROOKHAVEN TOWN BOARD, and therefore having been on the prior prevailing side was a proper party to make said motions.

On September 25, 2006, the Planning Board of Respondent-Defendant BROOKHAVEN, premised upon the Special Permit approval of the Respondent-Defendant BROOKHAVEN TOWN BOARD, adopted a Resolution approving the Site Plan for the Caithness project, with numerous covenants and conditions to be met.

In August of 2006 Petitioners-Plaintiffs herein instituted their prior action (Index Number 2006-23201) against Respondents-Defendants herein, except Respondent-Defendant BROOKHAVEN PLANNING BOARD, against whom they filed a separate action in October, 2006 (Index Number 2006-29596). In rendering the decisions in those actions, this Court found that, absent a record rendering an explanation for its change of determination regarding the prior refusal to adopt the SEQRA Resolution, Respondent-Defendant BROOKHAVEN TOWN BOARD's subse-

quent July 25, 2006 adoption of a SEQRA Resolution identical to the one previously defeated on June 6, 2006, was arbitrary, capricious, unlawful, invalid and of no force or effect. This, in turn, invalidated Respondent-Defendant BROOKHAVEN TOWN BOARD's adoption of the prior Special Permit Resolution in July 25, 2006, and the subsequent adoption by Respondent-Defendant BROOKHAVEN PLANNING BOARD, on September 25, 2006, of the prior Site Plan Resolution, as they were predicated on the July 25, 2006 invalid SEQRA Resolution.

After receipt of this Court's May 22, 2007 decisions in the prior proceedings, Respondent-Defendant BROOKHAVEN TOWN BOARD passed a Resolution adopting a SEQRA Findings Statement (SEQRA Resolution) on June 5, 2007, which, unlike the July 25, 2006 SEQRA Resolution, included language setting forth its explanation for its determination on June 5, 2007, contrary to its prior determination on June 6, 2006. Thereafter, at the same meeting, Respondent-Defendant BROOKHAVEN TOWN BOARD passed a new Special Permit Resolution, predicated upon their new SEQRA Resolution, and at a later date Respondent-Defendant BROOKHAVEN PLANNING BOARD passed a new Site Plan Resolution. Subsequently, Petitioners-Plaintiffs instituted this new hybrid action, as set forth herein above.

As this Court has repeatedly stated in prior decisions, it should be noted that it is well settled law in the State of New York that a Court may not substitute its own judgment for that of the reviewing board *(see: Janiak v. Planning Board of the Town of Greenville*, 159 AD2d 574, 552 NYS2d 436 [2nd Dept], *appeal denied* 76 NY2d 707, 560 NYS2d 989,

561 NE2d 889 [1990]; *Mascony Transport and Ferry Service v. Richmond*, 71 AD2d 896, 419 NYS2d 628 [2nd Dept 1979], *aff'd*, 49 NY2d 969, 428 NYS2d 948, 406 NE2d 803 [1980]). Therefore, if the decision rendered by the reviewing board is within the scope of the authority delegated to it, the Court may not interfere and annul it, unless said decision is arbitrary, capricious or unlawful (*see*, *Castle Properties Co. v. Ackerson*, 163 AD2d 785, 558 NYS2d 334 [3rd Dept 1990]).

THE NEW SEQRA RESOLUTION:

In regard to the First Claim for Relief in the instant Petition-Complaint, and subparagraph (a) of the relief requested in Petitioners-Plaintiffs Order to Show Cause herein, the Court recites herein several instances of specific language of the prior decision of May 22, 2007, under Index Number 2006-23201 (*East End Property v Town of Brookhaven*, 15 Misc3d 1138(A), 841 NYS2d 819, 2007 WL 1519037, 2007 NY Slip Op 51032 [2007]), that sets the parameters of said prior decision, concisely:

As regards the Fifth Claim for Relief in said prior action:

> "That leaves this Court confronted with the inescapable fact that the transcript submitted by Respondents-Defendants BROOKHAVEN and BROOKHAVEN TOWN BOARD demonstrates that the SEQRA Resolution was brought up in the public session of the July 25, 2006 meeting, was properly reintroduced by a waiver of the Rules of Procedure, but then adopted with the same language, absent an explanation in the

SEQRA Resolution for the adoption (as opposed to the prior denial), and without any discussion on the record prior to said adoption. This does not meet the standards set forth clearly herein above, as promulgated by both the Appellate Division and Court of Appeals, and thus fails to meet the standard of literal compliance with both the letter and spirit of SEQRA.

Therefore, the Fifth Claim for Relief must be granted, solely to the extent that the adoption of the SEQRA Resolution by re-vote of Respondent-Defendant BROOKHAVEN TOWN BOARD, devoid of the requisite explanation for reaching the different result (passage as opposed to rejection), renders said action arbitrary and capricious, resulting in the declaration of said SEQRA Resolution null, void and of no force and effect. and requiring, pursuant to Article 78, that it be remanded to Respondent-Defendant BROOKHAVEN TOWN BOARD for proper action."

As regards the Sixth Claim for Relief in said prior action:

"The issues of SEQRA, generally, including the FEIS, were all disposed of by the decision rendered in the Nassau Action, as stated herein above. The issue of the Special Permit Resolution was disposed of by the decision herein above, to the extent of Petitioners-Plaintiffs standing to challenge same. The Nassau Action granted them standing to challenge the SEQRA procedures, while ruling against them on the specifics, but that same grant of standing

allowed them to challenge the instant and separate SEQRA actions of Respondents-Defendants BROOKHAVEN and BROOKHAVEN TOWN BOARD, and the manner of adoption by Respondent-Defendant BROOKHAVEN TOWN BOARD of the SEQRA Resolution.

The odd manifestation of the situation at hand is that, although lacking standing to challenge the Special Permit Resolution, as determined herein above, their success in challenging the manner of adoption of the SEQRA Resolution, as determined pursuant to the immediately prior Claim for Relief, serves to annul the Special Permit Resolution, as it cannot stand without a properly adopted SEQRA Resolution.

Furthermore, in the related action against Respondent-Defendant BROOKHAVEN's Planning Board, while Petitioners-Plaintiffs lack standing to challenge same pursuant to their failure to demonstrate they are within the zone of interest or suffer injury different from the general public, their right to challenge pursuant to SEQRA, and the resultant nullification of Respondent-Defendant BROOKHAVEN TOWN BOARD's action, deprives the Planning Board of the ability to take action to approve the site plan, for lack of a properly adopted Special Permit, and therefore renders the actions of Respondent-Defendant BROOKHAVEN's Planning Board a nullity, void and of no force and effect."

Furthermore, this Court was very clear in said prior decision as to the scope of action necessary to cor-

rect the prior error, and the record, regarding this matter, setting forth the following language therein:

> "This Court further notes that compliance with these requirements is not onerous. It is further well settled that the Courts in New York have accorded great deference to the explanations offered by boards for their contrary determinations under similar circumstances, as well as to changes in policy (*See, Hawryluk v Zoning Board of Appeals of the Town of Huntington*, 173 AD2d 826, 571 NYS2d 53 [2 Dept 1991]; *Ciampa v Hudson*, 158 AD2d 925, 551 NYS2d 89 [4 Dept 1990]; *Pesek v Hitchock*, 156 AD2d 690, 549 NYS2d 164 [2 Dept 1989); *Knight v Amelkin, supra)*. The Appellate Division, Second Department, recently confirmed that the Courts will generally defer to the explanation for reaching a different result on similar facts, sustaining the determination because a rational explanation for reaching the different result on similar facts was provided (*See, Berk v McMahon*, 29 AD3d 902, 814 NYS2d 753 [2 Dept 2006], citing *Knight v Amelkin, supra*)."

In rendering this decision, this Court will defer to the explanation of Respondents-Defendants BROOKHAVEN for reaching a different result, sustaining its determination because a rational explanation for reaching the different result was provided. As noted above, New York Courts accord great deference to the explanations offered by boards for their contrary determinations under similar circumstances, and this Court finds that Respondents-Defendants have adequately met that standard.

Therefore, the First Request for Relief must be dismissed.

THE NEW ZONING RESOLUTION:

In regard to the Second Claim for Relief in the instant Petition-Complaint, and subparagraph (b) of the relief requested in Petitioners-Plaintiffs Order to Show Cause herein, the Court notes that in the May 22, 2007 prior ruling (*East End Property v Town of Brookhaven*, 15 Misc 3d 1138(A), 841 NYS2d 819, 2007 WL 1519037, 2007 NY Slip Op 51032 [2007]), it was clearly set forth that Petitioners-Plaintiffs has no standing to challenge the Zoning Resolution therein, as stated in the following language of said decision:

> "In order to demonstrate standing, Petitioners-Plaintiffs must show that they will suffer a harm that is in some manner different than the harm, the public may generally suffer, and that their alleged injuries fall within the zone of interest sought to be promoted or protected by the statute under which the municipality acted (*See, Society of Plastics Industry v County of Suffolk, supra; Redilker v Zoning Board of Appeals of the Town of Philipstown*, 280 AD2d 548, 721 NYS2d 77 [2 Dept 2001]; *Long Island Business Aviation Association, Inc v* Town *of Babylon*, 29 AD2d 794, 815 NYS2d 217 [2 Dept 2006]). The Courts have ruled that petitioners were not entitled to an inference of injury because they lived within about one-third of a mile, one-half mile, or between 832 to 2,519 feet from the subject property (*See, Olish v Heaney*,

> 2003 WL 21276342 [NY SupCt]; *Concerned Citizens for Open Space v City of White Plains*, 2003 WL 22283389 [NY SupCt]; *Oates v Village of Watkins Glen*, 290 AD2d 758, 736 NYS2d 478 [3 Dept 2002]), the last matter involving a petitioner who resided within 530 feet from a proposed WalMart super center. The status of neighbor does not automatically entitle one to standing for judicial review in every instance (*See, Sun-Brite Car Wash v Board of Zoning & Appeals of the Town of North Hempstead*, 69 NY2d 414, 515 NYS2d418, 508 NE2d 130 [1987]). Petitioners-Plaintiffs herein, none of whom live closer than one-half mile, and are not within the required notification area for Special Permit application, pursuant to the Town Code, do not demonstrate they are within the zone of interest, nor that they will suffer an injury different than the public at large, and therefore lack standing to challenge Resolution I adopted by Respondent-Defendant BROOKHAVEN TOWN BOARD regarding approval of the Special Permit, specifically."

Petitioners-Plaintiffs prevailed in invalidating the Zoning Resolution in the prior action only because the SEQRA Resolution upon which it was predicated was a nullity. The SEQRA Resolution herein is valid as set forth herein above, and therefore Petitioners-Plaintiffs lack both standing or the 'odd manifestation' they benefitted from last time, in order to prevail herein.

Therefore, the Second Request for Relief must be dismissed.

THE NEW SITE PLAN RESOLUTION:

In regard to the Third Claim for Relief in the instant Petition-Complaint, and subparagraph (c) of the relief requested in Petitioners-Plaintiffs Order to Show Cause herein, the Court reiterates that stated herein above, dispositive of the Second Claim for Relief and subparagraph (b) of the relief requested in the Order to Show Cause, as, for the same reasons, Petitioners-Plaintiffs lack both standing or the 'odd manifestation' they benefitted from last time, in order to prevail herein.

Therefore, the Third Request for Relief must be dismissed.

INJUNCTIVE RELIEF:

In regard to the Fourth Claim for Relief in the instant Petition-Complaint, and subparagraph (d) of the relief requested in Petitioners-Plaintiffs Order to Show Cause herein, the first three Requests for Relief having been dismissed, there remain no grounds upon which to grant injunctive relief.

Therefore, the Fourth Request for Relief must be dismissed.

DECLARATORY JUDGMENT:

In regard to the Fifth Claim for Relief in the instant Petition-Complaint, and subparagraph (e) of the relief requested in Petitioners-Plaintiffs Order to Show Cause herein, no justiciable controversy haven arisen, and none currently existing, con-

cerning the lawfulness of the SEQRA, Zoning and Site Plan Resolutions, and the procedures and proceedings upon which same are based, the Court cannot grant a Judgment, pursuant to CPLR 3001, since none is necessary in order to fully and fairly adjudicate all claims, controversies and disagreements of the parties concerning such Resolutions.

Therefore, the Fifth Request for Relief must be dismissed.

RESERVATION OF APPELLATE RIGHTS:

In regard to the Sixth Claim for Relief in the instant Petition-Complaint, the Court knows of no right to reserve appellate rights, as same is statutory, with strict time limitations that must be observed, this Court lacking the authority to grant relief therefrom.

Therefore, the Sixth Request for Relief must he dismissed.

COSTS AND DISBURSEMENTS:

In regard to subparagraph (f) of the relief requested in Petitioners-Plaintiffs Order to Show Cause herein, said parties having failed to prevail, this is no legitimate claim for costs and reimbursements.

Therefore, the request for costs and disbursements must be dismissed.

RESPONDENTS-DEFENDANTS' MOTIONS:

Respondents-Defendants having brought Motions (002), (003) and (004) to dismiss the Fifth and Sixth Requests for Relief, and same having been dismissed herein above, based on their own lack of sustainability, said Motions are moot, and require no further analysis.

Therefore, Respondents-Defendants' Motions must be dismissed.

For all the reasons stated herein above and in the totality of the papers submitted herein, it is, therefore,

ORDERED, that Petitioners-Plaintiffs' Combined Petition-Complaint and Order to Show Cause (001) are hereby denied in all respects, and this action is hereby disposed; and it is further

ORDERED, that Respondents-Defendants Motions (002), (003) and (004) are hereby dismissed as moot.

Dated: Riverhead, New York
January 2, 2008

HON. JEFFREY ARLEN SPINNER, J.S.C.

✓ Final Disposition	Non-Final Disposition
✓ Scan	Do Not Scan

TO:

ROSENBERG CALICA & BIRNEY, LLP
Attorneys for Petitioners-Plaintiffs
100 Garden City Plaza, Suite 408
Garden City, New York 11530

DEVITT SPELLMAN BARRETT, LLP
Attorney for Respondents-Defendants BROOKHAVEN
50 Route 111
Smithtown, New York 11787

CARTER LEDYARD & MILBURN LLP
Attorneys for Respondent-Defendant LIPA
2 Wall Street
New York, New York 10005-2072

WESTERMAN BALL EDERER MILLER & SHARFSTEIN, LLP
Attorneys for Respondent-Defendant CAITHNESS
170 Old Country Road, Suite 400
Mineola, New York 11501

(4)

08-1464

No. : _____

FILED
JUN 24 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the

Supreme Court of the United States

EAST END PROPERTY COMPANY #1 LLC, MARK KASPIEV, JOHN McCONNELL, JOHAN McCONNELL, DONALD SEUBERT, PATRICIA SEUBERT, FRANCESCA HURLEY, MICHAEL HURLEY, LAURENCE EINUIS, EMILY KARLOVITS, STEPHEN HENRY, THE YAPHANK TAXPAYERS AND CIVIC ASSOCIATION, INC. and the SOUTH YAPHANK CIVIC ASSOCIATION, et al.,

Petitioners,

v.

TOWN BOARD OF THE TOWN OF BROOKHAVEN, THE TOWN OF BROOKHAVEN, and CAITHNESS LONG ISLAND, LLC, et al.,

Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

DEVITT SPELLMAN & BARRETT, LLP
Attorneys for Respondents
50 Route 111
Smithtown, New York 11787
(631) 724-8833

June 2009

DICK BAILEY SERVICE (212) 608-7666 (718) 522-4363 (516) 222-2470 (914) 682-0848 Fax (718) 522-4024
1-800-531-2028

QUESTIONS PRESENTED

1. Whether property owners who unsuccessfully asserted state law claims in state court may assert a substantive due process violation under the United States Constitution for the first time in this Court, where they failed to raise, argue or preserve any federal or U.S. constitutional issue of any kind in the state courts below and where those state courts have not considered such issues in this litigation?

2. Whether a local zoning decision to approve the development of an industrial project on an industrially-zoned parcel of land can give rise to a violation of the substantive due process rights of owners of other property located in excess of one-half mile from the project site?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

Page

Statement Of The Case 1

Factual and Procedural Background 3

The Petition For Writ Of Certiorari Should Be Denied 6

I. Petitioners Did Not Raise A Substantive Due Process Claim In The State Courts 7

II. Plaintiffs Do Not Have A Valid Property Interest Worthy Of Substantive Due Process Protection 10

Conclusion 15

TABLE OF AUTHORITIES

Cases *Page (s)*

Adams v. Robertson,
520 U.S. 83, 117 S.Ct. 1028 (1997) 7, 8

Cardinale v. Louisiana,
394 U.S. 437, 89 S.Ct. 1161 (1969) 9

Catanzaro v. Weiden,
140 F.3d 91 (2d Cir. 1998) 11

Clubside, Inc. v. Valentin,
468 F.3d 144 (2d Cir. 2006) 11

Crowley v. Courville,
76 F.3d 47 (2d Cir. 1996) 11

East End Property Co. No. 1, LLC v. Kessel,
46 A.D.3d 817, 851 N.Y.S.2d 565
(2d Dep't 2007) 5

Gagliardi v. Village of Pawling,
18 F.3d 188 (2d Cir. 1994) 11

Howell v. Mississippi,
544 U.S. 944, 125 S.Ct. 1655 (2005) 7, 8

Illinois v. Gates,
462 U.S. 213, 103 S.Ct. 2317 (1983) 10

Lisa's Party City Inc. v. Town of Henrietta,
185 F.2d 12 (2d Cir. 1999) 10

McGoldrick v. Compagnie Generale Transatlantique,
309 U.S.430, 60 S.Ct. 670 (1940) 9, 10

O'Mara v. Town of Wappinger,
485 F.3d 693 (2d Cir. 2007) 11

Retail Property Trust v. Board of Zoning Appeals of the Town of Hempstead,
98 N.Y.2d 190, 746 N.Y.S.2d 662 (2002) 12, 14

RRI Realty Corp. v. Incorporated Village of Southampton,
870 F.2d 911 (2d Cir. 1989) 11, 12

Twin County Recycling Corp. v. Yevoli,
224 A.D.2d 628, 639 N.Y.S.2d 392
(2d Dep't 1996) 12

Zahra v. Town of Southold,
48 F.3d 674 (2d Cir. 1995) 10

Other Authorities

Brookhaven Town Code § 85-45 5

Brookhaven Town Code § 85-45(E) 5

Brookhaven Town Code §85-309(B) 3

Rule 14 (g)(i) 6, 7

United States. 28 U.S.C. § 1257(a) 7

STATEMENT OF THE CASE

This proceeding was commenced pursuant to New York State CPLR Art. 78. Petitioners sought to review two determinations of the Town Board of the Town of Brookhaven ("Town Board") which adopted a findings statement pursuant to the New York State Environmental Quality Review Act and granted the application of Caithness Long Island, LLC ("Caithness"), for a special permit, waiver and area variances regarding the construction of a 350-megawatt dual-fuel, combined combustion turbine electric power generator and a determination of the Town of Brookhaven Planning Board approving the site plan for the facility.

In this petition for a writ of certiorari petitioners argue for the first time that the community benefits package aspect of the application, which consists of payments in lieu of taxes to be paid to the Town, violates substantive due process. Petitioners did not raise a substantive due process claim in the state court proceedings. No state court passed on the issue, albeit all of the claims in the underlying petition were dismissed on the merits. The record is devoid of any reference to the issue in the lower courts. Petitioners are raising the substantive due process claim for the first time in the present petition and, as such, the petition should be denied.

In any event, petitioners cannot legitimately claim that they have a valid property interest in a benefit that was entitled to constitutional protection. Petitioners do not have a property interest in the power plant or the real property upon which it is

being built. Petitioners are not entitled to a particular SEQRA determination. Petitioners have not been deprived of property and their baseless accusations of improper payments do not support their vacuous claim. They do not even have standing to challenge the community benefits package, which was agreed to by the applicant, Caithness, and the Town Board. Under these circumstances, the petition should be denied.

FACTUAL AND PROCEDURAL BACKGROUND

In June of 2004, respondent-respondent Caithness was selected by LIPA to establish a state-of-the-art electrical generating facility to provide critically needed electric energy for the residents of the Town of Brookhaven. Caithness proposed to construct this power plant on a 15-acre footprint within a 96 acre parcel in the Town of Brookhaven. This 96 acre parcel is located in an area which is zoned "Light Industrial-1". An electric generating facility is a permitted use within the L-1 zone. Brookhaven Town Code §85-309(B).

During 2004, the Town of Brookhaven and the Brookhaven Town Board began working with LIPA during the State Environmental Quality Review process. LIPA was the lead agency, but the Town was actively involved in the SEQRA process. During the SEQRA review process, public meetings were held regarding the draft scope of the work and the Draft Environmental Impact Statement ("DEIS"). Public comment was accepted throughout this process.

During the Summer of 2005, LIPA and the Town began negotiating a community benefits package which principally consisted of payments in lieu of taxes ("PILOTs"). The purpose of the PILOTs is to provide long-term certainty for local taxing authorities. The community benefits package, with a provision regarding the setting aside of 15% of PILOT payments for open space, was submitted to the Town Board before the public hearings.

Caithness applied for a special permit with associated variances in March, 2005. The first

public hearing was held on March 9, 2006. During the five hour hearing, representatives from Caithness and LIPA made presentations regarding the proposed construction of the plant. Board members made inquiries and comments on behalf of their constituents. While petitioners spoke out against the project, many members of the public spoke in favor of the project. Many municipalities, including the Village of Port Jefferson and the Suffolk County Legislature, supported the Caithness project.

On April 25, 2006 another public hearing regarding the Caithness application was held before the Town Board. Representatives from Caithness and LIPA gave additional presentations addressing inquiries from board members and comments from the public. Several of the petitioners herein again spoke, while others spoke in favor of the power plant. Thereafter, public comments continued to be made at board meetings and work sessions. Representatives of Caithness and LIPA appeared at the work sessions to further respond to inquiries.

On July 25, 2006, the Town Board, by a super majority vote of 5-2, voted to bring the SEQRA approval resolution to the floor for a vote. The Board, by a 5-2 vote, approved the Caithness SEQRA findings and thereafter approved the permit application[1]. After the Town Board voted in favor of the issuance of a special permit and issued its

---

[1] Contrary to petitioners' hyperbole, the failure to adopt the resolution on June 6, 2006 was insignificant insofar as the matter was held in abeyance and remained under consideration by the Town Board.

Findings, Conclusions and Decisions, the planning board began the site plan review process.

The Brookhaven Town Planning Board reviewed the site plan application pursuant to Brookhaven Town Code § 85-45. The Board fully considered the elements set forth in Brookhaven Town Code § 85-45(E). On September 12, 2006, a public hearing was held. The petitioners appeared at the public hearing and spoke by their attorney. On September 25, 2006, the Planning Board issued its SEQRA findings statement and approved the site plan.

As noted by petitioners, the Supreme Court, Suffolk County granted the underlying New York State CPLR Art. 78 petition to the extent that the Town Board was required to explain its change of vote concerning required environmental findings. The other claims in the petition were rejected. Thereafter, the Town Board provided the required explanation and the petition was dismissed. Appeals were taken from the original order, the order dismissing the petition and from an order dismissing petitioner's proceeding contesting the approval of the site by the Town Planning Board. All of the appeals were resolved in favor of the Town Board, Caithness and the Long Island Power Authority[2]. Petitioners' application for leave to appeal to the New York State Court of Appeals was denied.

---

[2] The appeal in East End Property Co. No. 1, LLC v. Kessel, 46 A.D.3d 817, 851 N.Y.S.2d 565 (2d Dep't 2007) involving the SEQRA determination was also resolved against petitioners.

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

The present petition does not raise a persuasive basis for review by this Court. Petitioner's false and misleading averments do not implicate this Court's discretionary powers of review. Critically, petitioners did not raise a Substantive Due Process claim in the state court proceedings. No state court in this case or in any related case has passed on the issues raised by petitioners, albeit all of petitioners' other claims have been soundly rejected. Petitioners have not complied with Rule 14 (g)(i) of this Court's rules and the petition should be denied on this ground alone. In any event, petitioners' omission weighs heavily against granting the petition and confirms that the belated claim has been fabricated solely for the purpose of obtaining review by this Court.

Moreover, petitioners have not identified a property interest worthy of constitutional protection and cannot state a substantive due process claim. Petitioners do not have a property interest in the power plant or the real property upon which it is being built. There is no benefit that petitioners can claim they are entitled to so as to substantiate their claim. Petitioners' mere subjective aversion to the facility does not suffice. Indeed, petitioners do not have standing to oppose the community benefits package agreed to by the Town and Caithness. The substantive due process claim raised for the first time in this petition is devoid of merit.

I. Petitioners Did Not Raise A Substantive Due Process Claim In The State Courts

Congress has given the Supreme Court the power to review final judgments or decrees rendered by the highest court of a State in which a decision could be had where any right is specially set up or claimed under the Constitution or the treaties or statutes of the United States. 28 U.S.C. § 1257(a). Under this statute and its predecessors, the Supreme Court has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim was either addressed by or properly presented before the state court that rendered the decision the Supreme Court has been asked to review. Howell v. Mississippi, 544 U.S. 944, 125 S.Ct. 1655 (2005); Adams v. Robertson, 520 U.S. 83, 117 S.Ct. 1028 (1997).

At bar, petitioners do not rely on any alleged exceptions to the foregoing rule, but erroneously claim that their substantive due process argument was raised by reference to its memorandum of law in support of the original petition. The memorandum of law does not contain a substantive due process argument. The general reference to the memorandum of law does not comply with this Court's Rule 14 (g)(i). Adams v. Robertson, supra at fn.3. Petitioners have not provided a specific reference to the place in the record where the matter appears. Petitioners have not quoted any decision or portion of the record where the argument was purportedly raised. They have not even quoted the memorandum where they allege the issue was presented. In fact, petitioners never raised a

substantive due process argument in any of the state court proceedings. Petitioners never raised a federal claim in any of the state court proceedings and the petition should be denied.

In Adams v. Robertson, supra, this Court explained that, "[w]hen the highest state court is silent on a federal question before us, we assume that the issue was not properly presented (citations omitted), and the aggrieved party bears the burden of defeating this assumption, ibid, by demonstrating that the state court had 'a fair opportunity to address the federal question that is sought to be presented here." 520 U.S. at 86-87. In the present case, all of the state courts are silent on the issue urged by petitioners in this application. Petitioners have ignored their burden of demonstrating that the state court had a fair opportunity to address the federal question. A review of the state court determinations confirms that the issue was never raised.

At best, petitioners' prior claims regarding the New York Open Meetings Law which, in any event, were abandoned by petitioners, implicate procedural due process. The purported constitutional question now raised by petitioners was not pressed by them, or passed on, in the state courts. The absence of any substantive due process claim in the lower proceedings warrants summary rejection of the petition. Howell v. Mississippi, supra.

Petitioners' fabrication of a Federal claim for the first time in this petition exemplifies the purpose of this Court's practice. No state court has had an opportunity to address petitioners newly crafted substantive due process claim. The asserted validity

of the claim as it relates to the application of local codes and state statutes has not been considered. The veracity of petitioner's assertions regarding their federal claim has not been tested by any other court, albeit petitioners' state law claims have all been rejected.

In Cardinale v. Louisiana, 394 U.S. 437, 89 S.Ct. 1161 (1969), this Court set forth the rationale for refusing to consider claims that had not been raised in the lower courts: "Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though States are not free to avoid constitutional issues on inadequate state grounds, citation omitted, they should be given the first opportunity to consider them." Cardinale v. Louisiana, 394 U.S. at 439. At bar, no state court was given the opportunity to consider petitioners' newly fabricated substantive due process claim and this Court should decline to entertain petitioners newly manufactured federal claim.

In McGoldrick v. Compagnie Generale Transatlantique, 309 U.S.430, 60 S.Ct. 670 (1940), this Court emphasized that, "[i]n the exercise of our appellate jurisdiction to review the action of state courts we should hold ourselves free to set aside or revise their determinations only so far as they are

erroneous and error is not to be predicated upon their failure to decide questions not presented. Similarly their erroneous judgments of unconstitutionality should not be affirmed here on constitutional grounds which suitors have failed to urge before them, or which, in the course of proceedings there, have been abandoned." McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. at 435.

The error urged by petitioners at bar, amounting to an alleged violation of substantive due process, was never a part of the lower court determination inasmuch as it was never raised in those courts. The state courts in this case have not passed on the purported violation of substantive due process and for this reason this Court should not entertain the new claim. See Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317 (1983). Accordingly, the petition should be denied.

II. Plaintiffs Do Not Have A Valid Property Interest Worthy Of Substantive Due Process Protection

To state a substantive due process claim for deprivation of property a party must first establish that he had a valid property interest in a benefit that was entitled to constitutional protection. Zahra v. Town of Southold, 48 F.3d 674 (2d Cir. 1995). Second a plaintiff must demonstrate that the defendant's action depriving plaintiff of that protected interest was so outrageously arbitrary as to be a gross abuse of governmental authority. Lisa's Party City Inc. v. Town of Henrietta, 185 F.2d

12 (2d Cir. 1999). Substantive due process protects individuals against governmental action that is arbitrary, conscience-shocking, or oppressive in a constitutional sense, but not against governmental action that is incorrect or ill-advised. Catanzaro v. Weiden, 140 F.3d 91 (2d Cir. 1998).

To establish a property interest, a plaintiff must show a legitimate claim of entitlement. Crowley v. Courville, 76 F.3d 47 (2d Cir. 1996). In order for an interest in a particular land-use benefit to qualify as a property interest for purposes of the substantive due process clause a landowner must show a clear entitlement to that benefit. Clubside, Inc. v. Valentin, 468 F.3d 144 (2d Cir. 2006); O'Mara v. Town of Wappinger, 485 F.3d 693 (2d Cir. 2007). Where a regulator has discretion with regard to the benefit at issue there normally is no entitlement to that benefit. Gagliardi v. Village of Pawling, 18 F.3d 188 (2d Cir. 1994).

Petitioners do not have a property interest in the power plant or the real property upon which it is being built. The project involves an application for a special use permit under New York State Law. It is well accepted that Federal courts should not sit as a zoning board of appeals to review zoning determinations of local authorities. O'Mara v. Town of Wappinger, supra; RRI Realty Corp. v. Incorporated Village of Southampton, 870 F.2d 911 (2d Cir. 1989), cert. denied 493 U.S. 893, 110 S.Ct. 240 (1989). Petitioners do not have a protectable interest in denial of the permit. Cf. Clubside, Inc. v. Valentin, supra. In fact, as demonstrated below, the state courts all properly concluded that petitioners do not have standing to challenge the permit. This

Court should decline to review the entirely reasonable zoning determinations made by the Town Board. RRI Realty Corp. v. Incorporated Village of Southampton, supra.

It is fundamental that, unlike a variance which gives permission to an owner to use property in a manner inconsistent with a local zoning ordinance, a special use permit gives permission to use property in a way that is consistent with the zoning ordinance, although not necessarily allowed as of right. Retail Property Trust v. Board of Zoning Appeals of the Town of Hempstead, 98 N.Y.2d 190, 746 N.Y.S.2d 662 (2002). The significance of this distinction is that the inclusion of the permitted use in the ordinance is tantamount to a legislative finding that the permitted use is in harmony with the general zoning plan and will not adversely affect the neighborhood. Retail Property Trust v. Board of Zoning Appeals of the Town of Hempstead, supra. Normally, a reviewing board is required to grant a special use permit unless there are reasonable grounds for denying the permit. Twin County Recycling Corp. v. Yevoli, 224 A.D.2d 628, 639 N.Y.S.2d 392 (2d Dep't 1996).

Moreover, petitioners' proximity to the plant site did not afford them standing to contest approval of the special use permit. The New York State Appellate Division, Second Department ruled that the New York State Supreme Court properly determined that the petitioners lacked standing to assert their claims challenging the Town Board's approval of the special permit, waiver, and area variances. The New York State Appellate Division, Second Department explained that petitioners may

not avail themselves of the presumption of injury in fact since they have not demonstrated that their properties lie in close proximity to the site and they have otherwise failed to demonstrate that they will suffer any injury which is in some way different from that of the public at large. Petitioners' mere subjective aversion to the facility does not suffice. Petitioners do not have an property interest that is entitled to constitutional protection and the belated substantive due process claim is vacuous.

Petitioners do not have standing to challenge the community benefits package which consists of payments in lieu of taxes to be paid to the Town. This structure avoids future tax grievances and provides a measure of certainty to both the Town and the applicant. Critically, the applicant does not object to the required payments in lieu of taxes. Caithness supports the community benefits package. Petitioners lack standing to oppose the payment structure. Indeed, petitioners are not adversely affected by the Community Benefits Package.

The fact that the Town Board, in its discretion, approved the Community Benefits Package in the best interests of the citizens of the Town, weighs against petitioners' substantive due process claim not in favor of the new claim. Petitioners' accusations of bribery and illegal payments are utterly baseless and, in any case, do not create a protectable property interest. The community benefits package was properly negotiated between the affected parties for the welfare of the citizens of the Town. Petitioners' unsubstantiated accusations of corruption do not

raise a constitutional question for review by this Court.

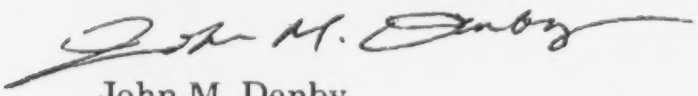
Petitioners' observation that they have a property interest in their own real property, petition at 20, is irrelevant. Petitioners have not been deprived of any property. The value of petitioners' property has not been diminished. Petitioners have not sustained any injury in fact. Petitioners' amorphous claim of entitlement based upon the Town Board's SEQRA resolution is unavailing. Petitioners were not entitled to any particular SEQRA determination. Accordingly, the substantive due process claim lacks merit and the petition should be denied.

The inclusion of the permitted use in the Town Code is tantamount to a legislative finding that the permitted use is in harmony with the general zoning plan and will not adversely affect the neighborhood. Retail Property Trust v. Board of Zoning Appeals of the Town of Hempstead, supra. In light of the detailed findings by the Town Board, based on extensive evidence, the state courts' determination upholding the FEIS and the legislative determination that the project is in harmony with the zoning plan and will not adversely affect the neighborhood, petitioners' assertion that they have or will suffer some vague deprivation is completely without substance. The substantive due process claim is thoroughly meritless and the petition for a writ of certiorari should be denied.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully Submitted,



John M. Denby
Counsel of Record

Devitt Spellman Barrett, LLP
50 Route 111
Smithtown, New York 11787

Counsel for Respondent
Town of Brookhaven.

132

(2)

No. 08-1464

Supreme Court, U.S.
FILED
JUN 26 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

EAST END PROPERTY COMPANY #1 LLC, MARK KASPIEV, JOHN MCCONNELL, JOHAN MCCONNELL, DONALD SEUBERT, PATRICIA SEUBERT, FRANCESCA HURLEY, MICHAEL HURLEY, LAURENCE EINUIS, EMILY KARLOVITS, STEPHEN HENRY, THE YAPHANK TAXPAYERS AND CIVIC ASSOCIATION INC., and the SOUTH YAPHANK CIVIC ASSOCIATION, *et al.*,

Petitioners,

v.

TOWN BOARD OF THE TOWN OF BROOKHAVEN, THE TOWN OF BROOKHAVEN, and CAITHNESS LONG ISLAND, LLC, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION FOR RESPONDENT LONG ISLAND POWER AUTHORITY

STEPHEN L. KASS
Counsel of Record
CHRISTINE A. FAZIO
JUDITH M. WALLACE
THEODORE Y. MCDONOUGH
CARTER LEDYARD & MILBURN LLP
2 Wall Street
New York, NY 10005-2072
(212) 732-3200

Counsel for Respondent Long Island Power Authority

QUESTIONS PRESENTED

1. Whether property owners who unsuccessfully asserted state zoning and environmental claims in state court may assert substantive due process claims under the due process clause of the Fourteenth Amendment to the United States Constitution for the first time in this Court, when they have failed to raise, argue or preserve any federal or U.S. Constitutional issues in the state courts and the state courts have not considered such issues at any point in this litigation.

2. Whether property owners located more than one-half mile from a project site are deprived of property without due process of law in violation of the Fourteenth Amendment to the United States Constitution when a town board and planning board, after public hearings and comprehensive zoning and environmental reviews, approve an industrial project in the town's industrial zone.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iv
STATEMENT	1
A. The Caithness Project	1
B. State Law Authorizing the Community Benefits Package	3
C. Proceedings Below	5
REASONS FOR DENYING THE PETITION	8
I. Petitioners Did Not Raise or Preserve Any Federal Constitutional Claim and No Federal Constitutional Issue Was Decided By Any Court Below	8
II. Petitioners Were Not Deprived Of Property Without Due Process Of Law	13
A. Petitioners Have No Protected Property Interest At Stake	13

Contents

Page

B. The Decisions Below Are Consistent With Federal Jurisprudence On Property Rights and Substantive Due Process 16

C. The Challenged Permits and Approvals Were Not Arbitrary or Capricious and Accordingly Have a Rational Basis 17

D. Petitioners Lack Article III Standing 18

CONCLUSION 19

TABLE OF CITED AUTHORITIES

Page

CASES

Adams v. Robertson, 520 U.S. 83, 117 S. Ct. 1028 (1997) 8, 9, 10, 12

Bd. of Regents v. Roth, 408 U.S. 564, 92 S. Ct. 2701 (1972) 14

Bower Assocs. v. Town of Pleasant Valley, 814 N.E.2d 410, 2 N.Y.3d 617 (2004) 16

Cine SK8, Inc. v. Town of Henrietta, 507 F.3d 778 (2d Cir. 2007) 13, 14

City of Cuyahoga Falls v. Buckeye Cmty. Hope Found., 538 U.S. 188, 123 S. Ct. 1389 (2003) 13, 17

Colella v. Bd. of Assessors of Nassau, 741 N.E.2d 113, 95 N.Y.2d 401 (2000) 12

E. End Prop. Co. #1, LLC v. Kessel, No. 1410/2006, 2006 WL 6200914 (N.Y. Sup. Ct. Nassau Co. Mar. 27, 2006), *aff'd*, 46 A.D.3d 817, 851 N.Y.S.2d 565 (App. Div. 2d Dep't 2007), *leave to appeal denied*, 892 N.E.2d 394, 10 N.Y.3d 926 (2008) 2

Cited Authorities

	Page
East End Prop. Co. #1, LLC v. Acampora, Index No. 2180-07 (N.Y. Sup. Ct. Albany Co. Oct 4, 2007)	3
Fetzer v. Town Bd. of Aurora, 289 A.D.2d 996, 734 N.Y.S.2d 915 (App. Div. 4th Dep't 2001)	12
Gagliardi v. Vill. of Pawling, 18 F.3d 188 (2d Cir. 1994)	14
Lingle v. Chevron, 544 U.S. 528, 125 S. Ct. 2074 (2005)	16, 17
Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S. Ct. 1148 (1982)	15
Mobil Oil Corp. v. Syracuse Indus. Dev. Agency, 559 N.E.2d 641, 76 N.Y.2d 428 (1990)	12
People v. Liner, 872 N.E.2d 868, 9 N.Y.3d 856 (2007)	12
People v. Angelo, 666 N.E.2d 1333, 88 N.Y.2d 217 (1996)	12
Reserve, Ltd. v. Town of Longboat Key, 17 F.3d 1374 (11th Cir. 1994)	14
River Park, Inc. v. City of Highland Park, 23 F.3d 164 (7th Cir. 1994)	18

Page

Ross v. Bank of Am., 524 F.3d 217 (2d Cir. 2008) 18

Twp. of Marlboro v. Planning Bd. of Holmdel, 653 A.2d 1183, 279 N.J. Super. 638 (Super. Ct. App. Div. 1995) 15

Vill. of Belle Terre v. Boraas, 416 U.S. 1, 94 S. Ct. 1536 (1974) 17

Webb v. Webb, 451 U.S. 493, 101 S. Ct. 1889 (1981) 8, 9, 10, 11

West Farms Assocs. v. State Traffic Comm'n, 951 F.2d 469 (2d Cir. 1991), *cert. denied*, 503 U.S. 985, 112 S. Ct. 1671 (1992) 14, 15

Yee v. City of Escondido, 503 U.S. 519, 112 S. Ct. 1522 (1992) 8, 9

STATUTES AND REGULATIONS

BROOKHAVEN TOWN CODE § 85-309 ..... 5, 15

BROOKHAVEN TOWN CODE § 85-313(G) 15

BROOKHAVEN TOWN CODE § 85-315(B) 15

N.Y. GEN. MUN. LAW § 852 4

Cited Authorities

	Page
N.Y. GEN. MUN. LAW § 858(4)	4
N.Y. GEN. MUN. LAW § 858(15)	3
N.Y. GEN. MUN. LAW § 874	4
N.Y. PUB. AUTH. LAW 1020-a	1
N.Y. PUB. AUTH. LAW 1020-f(h)	5
N.Y. PUB. AUTH. LAW 1020-g	1
N.Y. PUB. AUTH. LAW 1020-g(k)	5
N.Y. REAL PROP. TAX LAW § 300	3
28 U.S.C. § 1257	8
6 NYCRR 617.11(a)	15

OTHER AUTHORITIES

J. Peter Byrne, *Due Process Land Use Claims After Lingle*, 34 ECOLOGY L. Q. 471 (2007) ...	17

The certiorari petition should be denied. Petitioners did not raise any federal statutory or constitutional claims in the proceedings below. Petitioners also fail to set forth a cognizable federal substantive due process claim in the certiorari petition. Instead, Petitioners rely on misleading and improper representations about an agreement that consists principally of payments in lieu of property taxes over a twenty-two year term for an approximately 100-acre parcel improved with a new industrial use that was approved, after extensive public review, in accordance with state land use and environmental laws. Petitioners' numerous state-law challenges to that use having failed, they now improperly seek this Court's review of claims never asserted in any of these challenges.

STATEMENT

A. The Caithness Project

This case involves an effort by property owners, led by a developer of luxury apartments, opposing a much-needed natural gas fired electrical generating facility with state-of-the-art environmental controls (the "Caithness Project") through meritless and at times frivolous litigation.

The Long Island Power Authority ("LIPA"), a public authority created by New York statute to provide an adequate, reliable, efficient supply of electricity to its ratepayers in an economic manner, has contracted to purchase power from the Caithness Project. *See* N.Y. PUB. AUTH. LAW 1020-a, 1020-g. This public project is needed to supply increasing demand for electricity on

Long Island, including demand from the 795-unit luxury apartment complex developed by Petitioner East End Property Co. #1, LLC. (JR. 6271-73)[1]

As required by the New York State Environmental Quality Review Act, LIPA prepared a comprehensive Environmental Impact Statement ("EIS") for the Caithness Project. (JR. 388-1047) That EIS concluded that the Project would result in no significant adverse impacts to the environment. (*Id.*) LIPA coordinated this environmental review with other state and local agencies, including the New York State Department of Environmental Conservation, New York Public Service Commission, Suffolk County Department of Health Services, and the Town of Brookhaven Town Board ("Town Board") and Planning Board ("Planning Board"), which made similar but independent environmental findings and issued permits for the Project. (*See, e.g.*, JR. 3958, 4036, 6275.)

Petitioners challenged LIPA's environmental review and power purchase agreement in a previous proceeding in the New York Supreme Court, Nassau County, in which the court dismissed Petitioners' claims in their entirety. *See E. End Prop. Co. #1, LLC v. Kessel*, No. 1410/2006, 2006 WL 6200914 (N.Y. Sup. Ct. Nassau Co. Mar. 27, 2006), *aff'd*, 46 A.D.3d 817, 851 N.Y.S.2d 565 (App. Div. 2d Dep't 2007) (awarding costs to Respondents), *leave to appeal denied*, 892 N.E.2d 394, 10 N.Y.3d 926 (2008) (same). Petitioner East End Property's challenge to the Public Service Commission's

---

1. Joint Record on Appeal in Appellate Division Case No. 2007-05041 ("JR.__").

approvals and environmental findings in yet another proceeding, in the Supreme Court, Albany County, was also dismissed in its entirety.[2] As discussed below, Petitioners also brought three separate challenges in the Supreme Court, Suffolk County, which are now the subject of their certiorari petition. Notwithstanding Petitioners' characterization of this project as "noxious," the Caithness Project, which is now fully constructed and will commence commercial operation in July 2009, will be one of the cleanest power plants on Long Island. (JR. 6270)

B. State Law Authorizing the Community Benefits Package

Petitioners' strident characterization of the Project's Community Benefits Package ("CBP") as "illegal" and "corrupt" throughout the certiorari petition is misleading and improper. *See*, *e.g.*, Pet. at 5, 15, 17.

As the courts below acknowledged in their decisions, the CBP consists principally of an agreement to pay Payments In Lieu Of Taxes ("PILOTs"). *See* Petition Appx. at 35a, 80a; *see also* Petition at. 8, 12. PILOTs are explicitly authorized by New York state law. *See* N.Y. GEN. MUN. LAW § 858(15). Under New York law, owners of real property must pay real property tax unless they qualify for an exemption from that tax. *See* N.Y. REAL PROP. TAX LAW § 300. New York law also authorizes municipal industrial development agencies to facilitate economic development by entering into sale and

---

2. *East End Prop. Co. #1, LLC v. Acampora*, Index No. 2180-07 (N.Y. Sup. Ct. Albany Co. Oct 4, 2007) (an unreported decision).

leaseback arrangements for real property. *See* N.Y. GEN. MUN. LAW §§ 852, 858(4). The resulting projects are exempt from real property taxes but are instead required to negotiate agreements to pay PILOTs. *See* N.Y. GEN. MUN. LAW § 874. Such agreements specify the amount due annually (or a formula for calculating that amount over a term of years) and thereby encourage economic development by providing certainty to the taxpayer and taxing jurisdiction. *See id.*

The final CBP between Caithness and the Town of Brookhaven Industrial Development Agency (the "IDA") for the Caithness Project requires $184 million in PILOTs over approximately 22 years. (*See*, eg., JR. 78, 6282)[3] That amount, an average of $8.4 million per year, is a reasonable property tax equivalent for a 15-acre portion of an approximately 100-acre parcel improved with a major industrial project. The PILOTs will be made to the Town IDA and allocated among affected tax jurisdictions (in proportion to the amount of taxes those jurisdictions would have otherwise received) and is not distributed to favored projects of Town Board members as Petitioners allege. *See* Pet. at 3. Nor is the CBP the act of a renegade local board doling out funds to favored constituencies.

The final CBP also encompasses an agreement between LIPA and the Town that provides for $12 million to the Town of Brookhaven and nearby school

---

3. The final agreement as approved by the IDA is not contained in the Record below because it was executed after the Supreme Court Suffolk County proceeding commenced, which involved Petitioners' challenge to the draft terms of the agreement.

districts for community programs and energy efficiency projects. (JR. 78) This $12 million reflected an increase of $1 million for one school district when compared to the $11 million 2006 draft proposal that was the subject of Petitioners' lawsuit in the New York Supreme Court, Nassau County proceeding. *See supra* p. 2. LIPA's contractual arrangement with a municipality for this $12 million portion of the CBP is authorized by New York statute as a contract relating to the construction of a generating facility. N.Y. PUB. AUTH. LAW 1020-f(h),1020-g(k). The CBP is thus authorized by state law and was approved by both the New York Attorney General as to form and New York State Comptroller pursuant to the New York State Finance Law. (JR. 6284)[4] Therefore, Petitioners' repeated assertion that the CBP is not authorized by law is inaccurate. *See, e.g.*, Pet. at 4, 5, 11. Petitioners chose not to challenge directly the final agreements approved by the IDA and New York State Comptroller for the two components of the CBP, and the four-month statute of limitations for any such challenge has long since expired.

C. Proceedings Below

The Caithness Project is located in an area zoned for industrial use and in which the local zoning code expressly permits electrical generation facilities upon the issuance of a special use permit by the Town Board. *See* BROOKHAVEN TOWN CODE § 85-309. After a thorough review of the Caithness Project, including over 10 hours

---

4. *See, e.g., footnote 3 supra.* The final agreement approved by the State Comptroller was executed well after Petitioners commenced the actions below and is not included in the Record.

of public testimony at several Town Board meetings, the Town Board concluded that the Caithness Project would not result in any significant environmental impacts and found that the applications for a special use permit and height variances or waivers fully complied with state requirements under the New York Town Law and local requirements under the Town of Brookhaven's Town Code. (JR. 3402, 4011-29)

Petitioners subsequently challenged the environmental and land use approvals for the Caithness Project in three separate proceedings filed in the Supreme Court, Suffolk County. On May 22, 2007, the court held that Petitioners lacked standing to challenge a site plan approval by the Planning Board. *See* Pet. Appx. 17a–23a. In its second decision, decided the same day as the first, the Supreme Court held, among other things, that (1) the relitigation of Petitioners' substantive challenges to the sufficiency of the EIS for the Caithness Project in the guise of a challenge to the merits of the Town Board's decision was barred by the doctrine of res judicata; (2) the Town Board's decision to table its vote on environmental findings and to subsequently vote to approve such findings required an explanation on the record; and (3) Petitioners did not have standing to challenge the land use approvals and variances granted by the Town Board. *See* Pet. Appx. 24a–71a. In accordance with the Supreme Court's order, on remand the Town Board included an explanation on the record, re-approved the environmental findings and re-issued its land use approvals. (RR. 538-71)[5]

5. Record on Appeal in Appellate Division Case No. 2008-00757 ("RR.__").

Petitioners again challenged those environmental findings and land use approvals. In its third decision in this case, the Supreme Court dismissed Petitioners' challenge in its entirety. *See* Pet. Appx. 72a–93a.

The parties appealed all three decisions of the Supreme Court, Suffolk County. The Appellate Division, Second Department, affirmed the Supreme Court's finding that Petitioners lacked standing for their challenge to land use approvals and permits because Petitioners live too far away from the Caithness Project site and otherwise provided no affidavits demonstrating any harm different from the public at large. The Appellate Division also reversed the Supreme Court's decision invalidating the Town Board's first approval of environmental findings because it found those findings to be adequately supported by the record and therefore dismissed the challenge to the Town Board's revised environmental findings as academic. *See* Pet. Appx. 8a-10a; 12a-13a; 16a. The Court of Appeals denied Petitioners leave to appeal. *See* Pet. Appx. 2a.

REASONS FOR DENYING THE PETITION

The certiorari petition mischaracterizes the facts and law in two significant ways. First, Petitioners did not raise or preserve any federal issue in this litigation. Second, Petitioners fail to identify any protected property interest that would support a substantive due process claim. Accordingly, this case does not warrant review.

I. Petitioners Did Not Raise or Preserve Any Federal Constitutional Claim and No Federal Constitutional Issue Was Decided By Any Court Below

It is well settled that when reviewing state court judgments under 28 U.S.C. § 1257, this Court will, "with very rare exceptions," refuse to consider a petitioner's federal claim unless it was either addressed by or properly presented to the state court that rendered the decision the petitioner asks this Court to review. *Yee v. City of Escondido*, 503 U.S. 519, 533, 112 S. Ct. 1522, 1531 (1992); *Adams v. Robertson*, 520 U.S. 83, 86, 117 S. Ct. 1028, 1029 (1997) (per curiam). This rule serves two purposes. First, it reflects comity between the federal and state courts, and requires that "state courts be afforded the opportunity to perform their duty, which includes responding to attacks on state authority based on the federal law, or, if the litigation is wholly private, construing and applying the applicable federal requirements." *Webb v. Webb*, 451 U.S. 493, 499, 101 S. Ct. 1889, 1893 (1981). The rule also ensures that the record is adequately developed to enable this Court to address the issues presented. *Webb*, 451 U.S. at 500, 101 S. Ct. at 1893-94.

Petitioners did not raise a federal substantive due process claim, or even mention the Fourteenth Amendment to the United States Constitution, in their three petitions, numerous memoranda of law, three separately-briefed intermediate appeals, or brief seeking leave to appeal to the Court of Appeals of New York. Nor did the New York State courts mention, must less decide, any federal constitutional issue sua sponte. Each of the New York State courts' decisions were made exclusively on the basis of New York State law.

Where, as here, a state's highest court is silent on a federal question before the Court, it is assumed that the issue was not properly presented below, and petitioners fail to meet their burden of showing otherwise. *See Adams*, 520 U.S. at 86-87, 117 S. Ct. at 1029; *see aiso Webb*, 451 U.S. at 495, 101 S. Ct. at 1891 ("This Court has frequently stated that when 'the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts . . . .'") (citations omitted). Petitioners did not raise a federal question in the trial court, nor, as Petitioners' Rule 14(g)(1) statement confirms, did they cite any court's failure to address federal substantive due process in any questions on appeal. Thus, neither the Court of Appeals' decision to deny leave to appeal nor any of the Appellate Division's three decisions mention any federal issue. As in *Yee*, "[P]etitioners did not raise their substantive due process claim below, and because the state courts did not address it," it should not be considered here. 503 U.S. at 533, 112 S. Ct. at 1531.

Petitioners' passing reference to "due process" in their initial memorandum of law before the Suffolk County Supreme Court refers, at most, to a state law procedural due process claim under New York's Open Meetings Law and does not provide notice of a federal claim or either a procedural or substantive due process claim under the Fourteenth Amendment. To the extent that Petitioners also object to the fact that a Town Board that sits as a zoning board of appeals for land use determinations also, in its legislative capacity, evaluates the economic benefits of projects, *see* Pet. at 3, Petitioners' vague reference to "due process" in that context is simply inadequate to establish that the questions presented for review here were raised below. Similar to *Webb*, Petitioners' failure to cite to the United States Constitution or to any cases applying the substantive due process clause of the Fourteenth Amendment led the state courts to understand Petitioners to be referring to a question of state law. *See Webb*, 451 U.S. at 496-98, 101 S. Ct. at 1891-93; *see also Adams*, 520 U.S. at 89, n.3, 117 S. Ct. at 1031, n.3 (concluding that "passing invocations of 'due process'" that "fail to cite the Federal Constitution or any cases relying on the Fourteenth Amendment" do not "meet our minimal requirement that it must be clear that a *federal* claim was presented") (emphasis in original).

In *Adams*, a generalized discussion of "due process" in a context different than that asserted in the petition was insufficient to demonstrate that the "state court had 'a fair opportunity to address the federal question that [was] sought to be presented'" to the Court. 520 U.S. at 87, 117 S. Ct. at 1029. Moreover, even a reference to "due process" referencing the United States

Constitution would be insufficient to show that the issue raised here was decided below. It is well settled that "the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." *Webb*, 451 U.S. at 496-97, 101 S. Ct. at 1892.

Petitioners' passing reference to due process referred to the question of whether state Open Meetings Law procedures were violated, not to the constitutionality of the Community Benefits Package under the substantive due process clause of the Fourteenth Amendment. In fact, the Supreme Court, Suffolk County, exhaustively recited each of Petitioners' claims in its three decisions and at no point mentioned any federal constitutional issue, and, as a matter of state law, held that the Town Board complied with the Open Meetings Law. Pet. Appx. at 50-51a, 64-65a. As the Court has explained, "it would be unseemly in our dual system of government" to disturb the finality of a state court judgment on a federal ground that the state court did not have occasion to consider. *Webb*, 451 U.S. at 500, 101 S. Ct. at 1893-94.

Although Petitioners believe that the facts of this case raise important and recurring concerns, *see* Pet. at 5, this case has not involved an important and recurring issue of *federal law*. Essentially, Petitioners seek to challenge the holding that the zone of interest is different for state law land use claims than for state law environmental claims, which is purely an issue of state law. Petitioners also seek to challenge an

agreement that principally consists of PILOTs. Under New York law, a property owner does not have standing to challenge another property owner's property tax assessment or PILOTs. *See Colella v. Bd. of Assessors of Nassau*, 741 N.E.2d 113, 95 N.Y.2d 401 (2000); *Mobil Oil Corp. v. Syracuse Indus. Dev. Agency*, 559 N.E.2d 641, 76 N.Y.2d 428 (1990); *see also Fetzer v. Town Bd. of Aurora*, 289 A.D.2d 996, 734 N.Y.S.2d 915 (App. Div. 4th Dep't 2001) (following *Colella*).

As in *Adams*, "Petitioners have done nothing to demonstrate that they complied with the applicable state rules for raising their federal due process claim . . . ." 520 U.S. at 87, 117 S. Ct. at 1030. New York law generally provides that a claim is preserved only if it is asserted at trial. *See, e.g., People v. Liner*, 872 N.E.2d 868, 9 N.Y.3d 856 (2007) (finding confrontation clause challenge to admission of evidence unpreserved); *People v. Angelo*, 666 N.E.2d 1333, 1334, 88 N.Y.2d 217, 222 (1996) (due process challenge to expert testimony unpreserved "[b]ecause defendant failed to present these constitutional claims to County Court"). Petitioners seek review of a state court decision that was decided exclusively on state law grounds. That underlying proceeding, brought under Article 78 of New York's Civil Practice Law and Rules ("CPLR"), was decided on the basis of a voluminous administrative record, briefs and oral argument. Yet Petitioners can cite to only a single reference to "due process" in the entire 7400-page record below. "In short, [P]etitioners did not raise a substantive due process claim in the state courts, and no state court has addressed such a claim." *Yee*, 503 U.S. at 533, 112 S. Ct. at 1531. Therefore, the certiorari petition should be denied.

II. Petitioners Were Not Deprived Of Property Without Due Process Of Law

Petitioners ask this Court to find that conditions placed on land use permits and approvals for an industrially-zoned parcel constitutes a deprivation of Petitioners' property rights in their own parcels that implicates Fourteenth Amendment substantive due process. This newly raised claim would have this Court recognize a novel state property right as a threshold matter, even though that issue was not briefed, argued, or decided in any court below. This is an effort to relitigate a state court decision on federal law issues that were simply never raised and are transparently baseless.

A. Petitioners Have No Protected Property Interest at Stake

A federal substantive due process claim requires a showing of (1) a cognizable property or liberty interest and (2) egregious official conduct. *See City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 198, 123 S. Ct. 1389, 1396 (2003); *Cine SK8, Inc. v. Town of Henrietta*, 507 F.3d 778, 784 (2d Cir. 2007). Petitioners do not allege a protected liberty interest, and their alleged protected property interest regarding a parcel of property that Petitioners neither own nor use is unfounded in both federal and state law. Property interests "are not created by the Constitution" but "[r]ather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that

support claims of entitlement to those benefits." *Bd. of Regents v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 2709 (1972); *see also Cine SK8, Inc.*, 507 F.3d at 784 (requiring real property right to be vested under state law to support substantive due process claim).

Petitioners, in the last paragraph of their certiorari petition, assert two theories for a property interest in the use of a parcel located well over one-half mile from their own homes. First, Petitioners assert "they have a property interest in their own real estate, and its environment." Pet. at 20. Ownership of real property—even the regulated parcel—is not sufficient to establish a property right for the purposes of a challenge to land use regulation. *See, e.g., Reserve, Ltd. v. Town of Longboat Key*, 17 F.3d 1374 (11th Cir. 1994). Furthermore, in *West Farms Associates v. State Traffic Commission*, 951 F.2d 469, 472 (2d Cir. 1991), *cert. denied*, 503 U.S. 985, 112 S. Ct. 1671 (1992), the Second Circuit rejected an assertion of substantive due process rights premised on the procedural requirements of Connecticut's environmental review statute.

Second, Petitioners assert that the Town Board's re-vote on environmental findings and permits "g[ave] [P]etitioners a further claim of 'entitlement.'" Pet. at 20. This is at odds with Second Circuit case law holding that "[w]here a local regulator has discretion with regard to the benefit at issue, there normally is no entitlement to that benefit." *Gagliardi v. Vill. of Pawling*, 18 F.3d 188, 192 (2d Cir. 1994) (rejecting asserted property interest in zoning enforcement for adjoining parcel). With respect to the environmental findings, the court below held that the re-vote was permissible because

implementing regulations of the State Environmental Quality Review Act do not preclude a re-vote on a Town Board resolution to adopt an unchanged environmental findings statement. *See* Pet. Appx. at 8a-9a (citing 6 NYCRR 617.11(a)). Because the Town Board had discretion under state law to approve the Caithness Project, Petitioners had no entitlement. With respect to zoning issues, the local zoning code authorizes electric generation facilities in an area zoned for industrial use upon issuance of a special permit and provides for height variances. BROOKHAVEN TOWN CODE §§ 85-309, 85-313(G), 85-315(B). Petitioners do not cite any authority for the proposition that they have a vested property interest in limiting another property owner to the as-of-right zoning limits of local law.

Nor does the substantive due process clause provide a remedy for Petitioners' generalized allegations of "[b]ribery, or something close to it." Pet. at 17. An "individual entitlement grounded in state law" is the "hallmark of property." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430, 102 S. Ct. 1148, 1155 (1982). Petitioners' failure to identify such an entitlement is fatal because "universal benefits are not property interests protected by the Due Process Clause." *West Farms Assocs.*, 951 F.2d at 472-73.

Petitioners principally rely on—but misrepresent—New Jersey state court decisions. *See* Pet. at 13. Petitioners state that *Township of Marlboro v. Planning Board of Holmdel*, 653 A.2d 1183, 279 N.J. Super. 638 (Super. Ct. App. Div. 1995), held that unlawful development agreements were "egregious enough to constitute a substantive due process violation," but

there was no federal issue raised or decided in that case. *See* Pet. at 13. The other New Jersey state cases cited by Petitioners all exclusively concern whether land use decisions were authorized by state law and do not address either a federal question or an issue under the United States Constitution. *See* Pet. at 12-15.

B. The Decisions Below Are Consistent With Federal Jurisprudence on Property Rights and Substantive Due Process

Nor is there any conflict between the New York courts' decisions and the decisions of this Court or any federal court.

Petitioners have not identified any courts supporting their property rights theories, much less a split among the states, a split among the federal Courts of Appeals or any discrepancy between New York state and federal decisions that warrants review by this Court. Indeed, if Petitioners had raised their federal constitutional claim below, New York law requires essentially the same substantive due process analysis. *See Bower Assocs. v. Town of Pleasant Valley*, 814 N.E.2d 410, 2 N.Y.3d 617 (2004) (Kaye, C.J.).

Petitioners cite *Lingle v. Chevron*, 544 U.S. 528, 125 S. Ct. 2074 (2005) and subsequent decisions by federal Courts of Appeal holding that property owners may assert substantive due process claims. *See* Pet. at 16. Those decisions are completely inapplicable to this case, because this Court in *Lingle* simply held that the inquiry by courts into whether government action "substantially advances legitimate state interests" is not

a valid takings test. 544 U.S. at 540-41, 125 S. Ct. at 2082-83. That decision did not alter the showing that property owners must make to demonstrate a substantive due process violation and "does not . . . disturb any of our prior holdings." *Lingle*, 544 U.S. at 545-46, 125 S. Ct. at 2085-86. *See also* J. Peter Byrne, *Due Process Land Use Claims After Lingle*, 34 ECOLOGY L. Q. 471 (2007). Here, where Petitioners have never asserted a takings claim, there is no conflict between the New York Court of Appeals' decision and this Court's takings jurisprudence that would warrant review by this Court.

C. The Challenged Permits and Approvals Were Not Arbitrary or Capricious and Accordingly Have a Rational Basis

As noted above, to establish a substantive due process violation, egregious official conduct is required. *Cuyahoga Falls*, 538 U.S. at 198, 123 S. Ct. at 1396. Petitioners' allegation that the Town considered statutorily impermissible factors when making its environmental findings has been rejected under a *less deferential* standard. *See* Pet. Appx. at 8a-9a. The Appellate Division examined the record and held that the Town Board's decisions were "neither arbitrary nor capricious, but [were] based on reasons readily apparent on the face of the record." Appx. at 9a.

On a substantive due process claim, a court must find that there is no conceivable rational basis in a permissible government objective. *Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 8, 94 S. Ct. 1536, 1540 (1974). Here, where the courts below found actual reliance on

permissible factors under New York law, Petitioners would surely have failed the more demanding test for their new federal claim, even if they had raised this claim below.

D. Petitioners Lack Article III Standing

Plaintiffs also lack Article III standing for their substantive due process claim. Standing is a "threshold question in every federal case, determining the power of the court to entertain the suit" and requires (1) an "injury in fact that is distinct and palpable", (2) "fairly traceable to the challenged action", and (3) "likely redressable by a favorable decision." *Ross v. Bank of Am.*, 524 F.3d 217, 222 (2d Cir. 2008) (citations omitted). Petitioners' failure to identify a property interest protected by the Fourteenth Amendment should also be fatal to their assertion of the requisite "injury" for the purposes of Article III standing. "Federal courts are not boards of zoning appeals" to decide routine land use disputes that do not involve federal issues. *River Park, Inc. v. City of Highland Park*, 23 F.3d 164 (7th Cir. 1994) (Easterbrook, J.). Nevertheless, Petitioners seek in this Court to relitigate the decisions below finding that Petitioners lack standing under state law to challenge the issuance of land use approvals by the Town of Brookhaven.

In sum, Petitioners have not alleged any federal constitutional property or liberty interest that would be violated by arbitrary government action; they have only alleged arbitrary government action. This is not a sufficient basis for a federal constitutional substantive due process claim, even if it were permissible to raise this new issue for the first time in a petition to this Court.

CONCLUSION

For all of the foregoing reasons, the writ of certiorari should be denied.

Respectfully submitted,

STEPHEN L. KASS
Counsel of Record
CHRISTINE A. FAZIO
JUDITH M. WALLACE
THEODORE Y. MCDONOUGH
CARTER LEDYARD & MILBURN LLP
2 Wall Street
New York, NY 10005-2072
(212) 732-3200

Counsel for Respondent
Long Island Power Authority

(3)

08-1464

JUN 26 2009

No.: _____

In the

Supreme Court of the United States

EAST END PROPERTY COMPANY #1 LLC, MARK KASPIEV, JOHN McCONNELL, JOHAN McCONNELL, DONALD SEUBERT, PATRICIA SEUBERT, FRANCESCA HURLEY, MICHAEL HURLEY, LAURENCE EINUIS, EMILY KARLOVITS, STEPHEN HENRY, THE YAPHANK TAXPAYERS AND CIVIC ASSOCIATION, INC. and the SOUTH YAPHANK CIVIC ASSOCIATION, et al.,

Petitioners,

v.

TOWN BOARD OF THE TOWN OF BROOKHAVEN, THE TOWN OF BROOKHAVEN, and CAITHNESS LONG ISLAND, LLC, et al.,

Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

WESTERMAN BALL EDERER MILLER & SHARFSTEIN, LLP
Attorneys for Respondent Caithness Long Island, LLC
170 Old Country Road, 4th Floor
Mineola, New York 11501
(516) 622-9200

BEVERIDGE & DIAMOND, P.C.
Co-Counsel for Respondent Caithness Long Island, LLC
477 Madison Avenue, 15th Floor
New York, New York 10022

June 2009

DICK BAILEY SERVICE (212) 608-7606 (718) 522-4363 (516) 222-2470 (914) 682-0866 FAX (718) 522-4026
1-800-531-2028

QUESTIONS PRESENTED

1. Whether property owners who unsuccessfully asserted exclusively state law claims in state court may assert a substantive due process violation under the United States Constitution for the first time in this Court, where they failed to raise, argue or preserve any federal or U.S. constitutional issue of any kind in the state courts below and where those state courts have not considered such issues in this litigation?

2. Whether a local zoning decision to approve the development of an industrial project on an industrially-zoned parcel of land can give rise to a violation under the United States Constitution of the substantive due process rights of owners of other property located in excess of one-half mile from the project site?

3. Whether property owners who live in excess of one-half mile from the project site, and who were found in the state courts below to have suffered no injury-in-fact and no harm different from other members of the public, and where the state courts also found, as a matter of fact, that the challenged project would not result in any significant adverse environmental impact, have Article III standing based on alleged injury to their real property or to their environment?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

CORPORATE DISCLOSURE STATEMENT

Respondent Caithness Long Island, LLC is owned by Caithness Energy LLC and Brookhaven Electric LLC; has the following affiliates: Brookhaven Generation LLC, CELI Land LLC and Caithness Long Island Power LLC; and has no subsidiaries.

TABLE OF CONTENTS

Page

INTRODUCTION 1

HISTORY OF THE CASE 6

A. The Caithness Project 6

B. SEQRA Review of the Project 7

C. The SEQRA Lawsuit 7

D. Caithness's Special Permit Application to the Town Board 9

E. The June 6 and July 25, 2006 Votes of the Town Board 10

F. The Community Benefits Package 11

G. Site Plan Approval 12

H. The Special Permit Appeal In State Court . 13

I. The Site Plan Appeal In State Court 14

J. Re-Approval by the Town of the Special Permit and Site Plan 14

K. The Re-Issuance Appeal In State Court 15

L. The Appellate Orders Rejecting Petitioners' Claims 16

M. Denial Of Further Review By The New York Court Of Appeals 20

PETITIONERS' MISSTATEMENTS OF FACT ... 21

POINT I:
PETITIONERS NEVER PREVIOUSLY ASSERTED A FEDERAL CLAIM ... 26

A. None Of The Factors Warranting A Grant Of Certiorari Is Present In This Case ... 26

B. Petitioners Did Not Raise A Federal Claim In The State Courts ... 26

C. Petitioners Did Not Properly Specify Any Federal Claims In The Petition ... 32

D. The Orders Were Based On Independent And Adequate State Grounds ... 33

POINT II:
PETITIONERS DID NOT SUFFER A VIOLATION OF SUBSTANTIVE DUE PROCESS ... 34

POINT III:
PETITIONERS LACK STANDING ... 39

CONCLUSION ... 40

TABLE OF AUTHORITIES

Cases *Page (s)*

Adams v. Robertson,
520 U.S.83 (1997) 27

Bankers Life & Cas. Co. v. Crenshaw,
486 U.S. 71 (1988) 30

Braniff Airways, Inc. v. Neb. State Bd. of Equalization & Assessment,
347 U.S. 590 (1954) 31

Cilla v. Mansi,
No. 3563-02, 2002 WL 1275122 (Sup. Ct. Suffolk County March 5, 2002) 29

City of Cuyahoga Falls, Ohio v. Buckeye Community Hope Found,
538 U.S. 188 (2003) 34, 36

Cornell v. Green,
163 U.S. 75 (1896) 28

County of Sacramento v. Lewis,
523 U.S. 833 (1998) 37

Daimler Chrysler Corp. v. Cuno,
547 U.S. 332 (2006) 39

Daniels v. Williams,
474 U.S. 327 (1986) 30

Dist. Attorney's Office for Third Judicial Dist. v. Osborne,
No. 86-6, 2009 WL 1685601 (U.S. June 18, 2009) 38

Durley v. Mayo,
351 U.S. 277 (1956) 33

East End v. Kessel,
851 N.Y.S.2d 565 (App. Div. 2007) 8

East End v. Kessel,
892 N.E.2d 394 (N.Y. 2008) 9

East End v. Kessel,
851 N.Y.S.2d 565 (App. Div. 2007) 11

East End Prop. Co. #1 LLC v. Town Bd. of Brookhaven,
868 N.Y.S.2d 264 (App. Div. 2008) 17

East End Prop. Co. #1 LLC, et al. v. Planning Bd. of Town of Brookhaven,
867 N.Y.S.2d 685 (App. Div. 2008) 19

East End Prop. Co. #1 LLC v. Town Bd. of Brookhaven,
867 N.Y.S.2d 686 (App. Div. 2008) 19

Fox Film Corp. v. Muller,
296 U.S. 207 (1935) 33

Gagliardi v. Vill. Of Pawling,
18 F.3d 188 (2d Cir. 1994) 36

Greenbriar Vill., L.L.C. v. Mountain Brook City,
345 F.3d 1258 (11th Cir. 2003) 35

Howell v. Miss.,
543 U.S. 440 (2005) 27, 30

Kauth v. Hartford Ins. Co. of Ill.,
852 F.2d 951 (7th Cir. 1988) 35

Natale v. Town of Ridgefield,
170 F.3d 258 (2d Cir. 1999) 37

Regents of Univ. of Mich. v. Ewing,
474 U.S. 214 (1985) 35

Ross v. Bank of Am., N.A.,
524 F.3d 217 (2d Cir. 2008) 39

Sochor v. Fla.,
504 U.S. 527 (1992) 29

Taylor v. Illinois,
484 U.S. 400 (1988) 30

United Artists Theatre Circuit, Inc. v. Township of Warrington, Pa.,
316 F.3d 392 (3d Cir. 2003) 37

Vill. of Belle Terre v. Boraas,
416 U.S. 1 (1974) 37

Washington v. Glucksberg,
521 U.S. 702 (1997) 35

Statutes

Brookhaven Town Code § 85-31.3 4
Brookhaven Town Code § 85-309 21
Brookhaven Town Code § 85-31 22
N.Y. Gen. Mun. Law §§ 858, 874 4
N.Y. Pub. Auth Law §§ 1020-f, 1020 4
N.Y. Env. Cons. L. § 8-0101 7

Other Authorities

Terry Rice, *Zoning & Land Use*, 48 Syracuse L. Rev. 1075 (1998) 29

INTRODUCTION

In 2003, Respondent Long Island Power Authority ("LIPA"), consistent with its statutory obligations, commenced a lengthy process aimed at developing additional electric-generation facilities to meet the urgent energy needs of Long Island, New York. After a comprehensive request for proposals ("RFP") process, a state-of-the-art 350 megawatt electric generating facility ("the Project") proposed by Respondent Caithness Long Island LLC ("Caithness") was chosen by LIPA as one of the projects to meet Long Island's energy needs. After that RFP process, an exhaustive environmental review assessment, two in-depth administrative zoning proceedings before the Town of Brookhaven ("the Town"), and approvals by numerous other governmental authorities, including the Offices of the New York State Comptroller and the New York State Attorney General, the County of Suffolk, the New York State Public Service Commission, the New York State Department Environmental Conservation and the U.S. Environmental Protection Agency, Caithness finally began construction of its facility in April 2007. The Project is located on an industrially-zoned parcel of land located within the Town on Long Island. The Project will become fully operational in July 2009, at which point it will be one of the cleanest power plants in New York State, far more efficient than any of the existing baseload power plants on Long Island.

Petitioners --- who are the owners (East End Property Company # 1, LLC ("East End")) of a large residential housing complex located in excess of one-

half mile from the Caithness facility and others located even farther away --- have mounted an unrelenting assault on the Project. They have brought five separate lawsuits in the New York State courts, on a wide range of grounds, trying to halt the Project. All of their arguments have been meritless, and all of their lawsuits have been rejected. On November 28, 2008, the Appellate Division of the Supreme Court of the State of New York ("Appellate Division") issued three separate orders ("the Orders") which collectively upheld the validity of certain zoning approvals granted to Caithness by two municipal boards --- Respondent Town Board of the Town of Brookhaven ("Town Board") and Respondent Planning Board of the Town of Brookhaven ("Planning Board"). On February 24, 2009, the New York Court of Appeals denied Petitioners' application for leave to appeal from the Orders. Petitioners now ask this Court to grant certiorari.[1]

The petition for certiorari ("the Petition") is not only meritless, it is frivolous. Petitioners never once raised a federal or constitutional issue in any of the New York courts below. As a result none of these courts had cause to even address, let alone rule on, any federal or constitutional issue. Although Rule 14(1)(g)(i) of this Court compels Petitioners to

---

[1] The Orders were issued by the Appellate Division when it denied Petitioners' appeals in the three lawsuits commenced in the Supreme Court of the State of New York (Suffolk County) ("the State Court"). These three lawsuits are described more fully below and are sometimes hereinafter referenced as the Special Permit Appeal, the Site Plan Appeal and the Re-Issuance Appeal. See Appendix to Petition ("Appendix") at 3a-10a, 11a-13a and 14a-16a.

point out specifically in the record where any such issue was raised, Petitioners have failed to do so. *See* Point I. *infra*.

In any event, there is no federal or constitutional issue in this case which warrants review by this Court. *See* Point II, *infra*. For the purpose of trying to fabricate such an issue, Petitioners have deliberately mischaracterized critical facts. Some of their more egregious factual distortions are discussed below. The crux of Petitioners' argument, *i.e.*, that they were deprived of substantive due process by reason of the allegedly unlawful conduct of Caithness and the Town --- which, according to Petitioners, consisted of "bribery, or something close to it in the context of municipal decision-making", whereby the Town effectively sold zoning approvals in exchange for large unauthorized contributions from Caithness --- is premised on a disgraceful falsification of what actually occurred. As amply demonstrated by the record, the zoning approvals issued by the Town to Caithness were based on the voluminous evidence submitted by Caithness which demonstrated that it was entitled to the requested zoning approvals under the applicable regulations, not on any improper payment of money. Indeed, during oral argument of the appeals before the Appellate Division, Petitioners' counsel conceded that there was substantial evidence to justify issuance of the zoning approvals under the applicable regulations of the Town.

The payment of "$150-200 Million" (hereinafter referred to as "the Community Benefits Package") to which Petitioners object was nothing more than payments-in-lieu of taxes ("PILOTS") to

the local taxing authority (*i.e.*, the Town), plus additional payments to the Town and nearby school districts for community benefits, including scholarship and apprenticeship programs. There were no bribes or under-the-table payments here. Although Petitioners claim that there is no authority whatsoever for the Community Benefits Package, this is simply incorrect. PILOT agreements with local Industrial Development Agencies ("IDAs") are commonly used in circumstances to assess the property value of parcels containing an improved industrial use like a power plant. A PILOT agreement provides long-term certainty for both the local taxing jurisdiction and the responsible taxpayer, and avoids tax certiorari litigation in the future. New York law grants broad authority to the Town's IDA to require PILOTs and to enter into agreements for such payments. N.Y. Gen. Mun. Law §§ 858, 874. LIPA, the party ultimately responsible for the payments, is also empowered by state law to enter into such agreements with municipalities. Similarly, there is no legal prohibition against a developer offering to support various local programs in the communities where its project will be located. N.Y. Pub. Auth. Law §§ 1020-f, 1020.

Petitioners contend that the zoning approvals granted by the Town were unlawfully conditioned on the Community Benefits Package. But it is well-established that municipal boards may impose conditions in connection with the issuance of a zoning approval and, in this case, the Town had a regulation which expressly authorized the imposition of reasonable conditions. *See* Brookhaven Town Code § 85-31.3. Here, the condition reasonably

related to the specific use for which a special permit was required. The condition merely required that Caithness, LIPA and the Town IDA complete the agreements relating to the Community Benefits Package (the parameters of which were already known and made public seven months earlier) prior to commencing construction. Significantly, the agreements actually setting forth the specific terms of the Community Benefits Package (including the PILOT) were reviewed and approved by the Office of the New York State Comptroller and the New York State Attorney General, as required by state law, and Petitioners never chose to challenge those approvals or agreements.

In sum, the Petition must be denied because (a) Petitioners never raised any federal question or constitutional issue in the courts below, and (b) there has been no egregious conduct by the respondents which violated any of Petitioners' substantive due process rights.[2]

---

[2] In addition, Petitioners also lack Article III standing to assert any such claim. *See* Point III, *infra*.

HISTORY OF THE CASE[3]

A. The Caithness Project

LIPA, which is obligated by statute to provide reliable electric service to its ratepayers, projected in 2003 that the underlying peak demand for energy on Long Island would grow by approximately 100 megawatts ("MWs") each year through 2012. JR 93-6, 427B-430, 3043-44, 6270-73. To meet this need, LIPA issued an RFP that would furnish 250 to 600 MWs of electric capacity. JR 417A, 6269-70. In June 2004, LIPA selected the Caithness proposal as one of two projects necessary to meet Long Island's energy needs. JR 405, 427D. LIPA determined that the Caithness Project would (i) enhance the reliability of the power system by increasing the generation of electricity on the eastern end of Long Island, where load growth is highest, (ii) minimize customer rates by more efficiently utilizing fuel, and (iii) promote a healthy environment by having, on a per megawatt-hour basis, very low air emissions. JR 427A-430, 883-95, 5054-55, 6269-70.

The Caithness facility will be 34% more efficient than the average Long Island power plant. It will consume 94% less water than a typical plant. It will be the cleanest power plant in New York State when it becomes operational --- 20 times cleaner per kilowatt hour than existing baseload plants on Long Island. The Caithness Project is anticipated to

---

[3] Petitioners filed three separate records in the Appellate Division in connection with each of the three appeals. References herein to the records for the Special Permit Appeal, Site Plan Appeal and Reissuance Appeal are designated, respectively, as "JR ___", "SPR ___" and "RR __".

reduce greenhouse gases "well past the Kyoto Accord" and will result in emissions reductions equivalent to taking 125,000 cars off the road. JR 883-95, 2678-83. The Caithness facility, which will come on line in July 2009, is critical to meet New York's energy needs. Without it, there will be a severe shortage of electricity on Long Island in the very near future. JR 94-95.

B. SEQRA Review of the Project

LIPA, as the lead agency, undertook a lengthy and exhaustive environmental review of the Caithness Project under the State Environmental Quality Review Act ("SEQRA"). N.Y. Env. Cons. L. § 8-0101, *et seq.* This process lasted approximately sixteen months. LIPA issued its Final Environmental Impact Statement ("FEIS") in June 2005. JR 388-1047, 5140-44. After reviewing all areas of potential environmental impact, the FEIS that concluded that the Caithness Project would not, either individually or cumulatively with other LIPA projects or nearby sources, result in any significant adverse environmental impact. No reputable environmental group has ever voiced opposition to the Caithness Project.

C. The SEQRA Lawsuit

On January 25, 2006, Petitioners commenced their first lawsuit to challenge the Project ("the SEQRA Lawsuit"). On that date, they began an action in the Supreme Court of the State of New York (Nassau County) challenging the SEQRA review process conducted by LIPA on every

procedural and substantive ground they could concoct, including claims that the environmental review failed to give due consideration to the residents of the Atlantic Point community (owned and operated by East End) located over 1/2 mile away. The lower court in the SEQRA Lawsuit upheld the SEQRA review process conducted by LIPA in all respects and rejected all of Petitioners' challenges to it. *Id.* Petitioners then appealed that decision to the Appellate Division, which affirmed, concluding, *inter alia*:

> LIPA satisfied its obligations under SEQRA by taking a "hard look" at the potential environmental impacts of the project in a final EIS. . . which thoroughly analyzed, among other things, land use and zoning impacts, impacts on historic, archaeological, and cultural resources, traffic, transportation, and noise impacts, impacts on visual resources and neighborhood character, air quality impacts, socioeconomic impacts, groundwater usage and water quality impacts, stormwater runoff impacts, terrestrial ecology impacts, cumulative impacts, and alternatives to the project.

East End v. Kessel, 851 N.Y.S.2d 565 (App. Div. 2007). The Appellate Division found that "in its lengthy analyses of potential environmental impacts, the conclusion of LIPA is supported by accepted governmental guidelines and scientific authorities."

Id. The New York Court of Appeals subsequently denied Petitioners' motion for leave to appeal in the SEQRA Lawsuit. *East End v. Kessel*, 892 N.E.2d 394 (N.Y. 2008).

D. Caithness's Special Permit Application to the Town Board

Because the Caithness Project is located in the Town's L-1 District, Caithness was required to obtain a special permit from the Town Board before constructing its facility. In connection with this permit, Caithness also asked the Town Board for relief from certain height limitations otherwise applicable to several components of the Caithness Project. Under the Brookhaven Town Code and New York State Town Law, the Town was authorized to grant this relief in the form of either a waiver or an area variance.

The Town Board held several public hearings on the Caithness Project. During these hearings, testimony was provided with respect to (i) the growing demand for electricity (in Brookhaven in particular), (ii) the need for the Caithness Project to enable LIPA to fulfill its obligations to its customers, (iii) the Project itself, including an overview of its minimal impact and significant benefits, (iv) the Project's compliance with Town Code requirements; and (v) the need for relief from the otherwise applicable height restrictions. JR 2677-86, 3061-83; JR 3133-355. None of the information and analyses presented by Caithness justifying the requested relief from the height restrictions was contested by any individual or party. JR 3133-355. During these hearings, the Town Supervisor stated that "[t]his

[proposal] received voluminous public commentary and input, more than I think of any other proposal in the history of the township." JR 3398-99.

E. The June 6 and July 25, 2006 Votes of the Town Board

The Project appeared on the Town Board's calendar for June 6, 2006. JR 3453. Before voting on the special permit, the Town Board was first required to consider a resolution to adopt SEQRA findings with respect to the environmental review conducted for the Project. Two members of the Town Board stated at that time that they needed more time to evaluate the Project. JR 3477-78. Therefore, when a motion on the SEQRA findings resolution was made, the Town Board voted 4 to 3 not to adopt it at that time.

With this vote, the Town Board made no substantive finding of any kind with respect to environmental impacts associated with the Project. The Town Board merely voted not to adopt SEQRA findings at that time. As a result, the Caithness application for a special permit could not be and was not decided at the meeting, *i.e.*, since the Town Board failed to adopt SEQRA findings on June 6, 2006, it did not proceed to consider any further action with respect to the Caithness special permit application that evening. JR 3480. Instead, the record shows that the Caithness special permit application remained on the Town Board's "pending decision" calendar for subsequent meetings of the Town Board. JR 3571-72, 3971-72. In sum, the Town Board did not vote on (and certainly did not deny) Caithness's special permit application on June

6, 2006, and did not make any substantive determination of any kind regarding the merits of the application, or its environmental impacts.

On July 25, 2009, after additional meetings and hearings, the Town Board voted to formally reintroduce a SEQRA findings resolution, which passed by a vote of 5 to 2. The Board then approved the Caithness special permit application, along with the requested relief from the height restrictions, also by a vote of 5 to 2. The administrative record conclusively demonstrated that Caithness satisfied all of the criteria necessary to support the Town Board's limited grant of variances and waivers, and is devoid of a single substantive reason indicating that the waivers/variances were not appropriate or that Caithness should not have received the special permit. JR 3042-3083.

F. The Community Benefits Package

As early as January 2006, a draft Community Benefits Package had been proposed to the Town in connection with the Project pursuant to which Caithness would pay at least $139 Million in PILOTs over a 20-year period (which payments LIPA would reimburse under their agreement with Caithness) and LIPA would pay about $11 Million to the Town and nearby school districts for additional community programs. Petitioners challenged the Community Benefits Package in the SEQRA Lawsuit (discussed above) where their claims were dismissed in their entirety. *See East End v. Kessel*, 851 N.Y.S.2d 565 (App. Div. 2007). As of July 2006, the parties had added an additional $1 Million to the Community

Benefits Package to support local community programs, increasing the total value from $150 Million to $151 Million.[4] On July 25, 2006, when the Town Board issued its special permit to Caithness, it included a condition which stated that, before Caithness could begin construction of the Project, agreements had to be in place between the Town, LIPA and the Town's IDA requiring payments of at least the amounts contemplated in the Community Benefits Package.[5]

G. Site Plan Approval

After the Town Board's special permit approval, the Town Planning Board considered Caithness's site plan application. SPR 334-419. Caithness demonstrated that the Project met all applicable site plan requirements, including the bulk and height requirements of the Town Code

---

[4] It is this less than one percent increase in the Community Benefits Package from January to July 2006 which, according to Petitioners, was the "massive sum of money" that caused the "corruption of [the] local land use process." *See* Petition at 5. The increase went to a local school district.

[5] Negotiations regarding the Community Benefits Package continued well after the Town Board issued all local zoning approvals to Caithness. The Community Benefits Package (due to the PILOT component) ultimately exceeded this amount. The final PILOT agreement between the IDA and Caithness required Caithness to pay $184 Million over approximately 22 years. LIPA and the Town also entered into a second agreement, which was approved by the New York State Comptroller, and under which LIPA formally committed to pay $12 Million to fund certain school district and community programs. As previously noted, neither agreement was ever challenged in court.

(consistent with the waivers and variances that had been granted by the Town Board). SPR 196-209, 344-353. On September 25, 2006, the Planning Board unanimously voted to approve its own SEQRA findings and the Caithness site plan application. SPR 424-443.

H. Special Permit Appeal In State Court

After the Town Board approved Caithness's special permit application, Petitioners commenced a judicial proceeding in State Court to challenge it ("Special Permit Appeal"). They raised various procedural objections to the Town Board's action, including a claim that the Town Board's re-vote on the SEQRA findings violated SEQRA. They also contended that the Town Board improperly granted Caithness relief from certain height restrictions. With one exception, the State Court dismissed all of Petitioners' claims. *See* Appendix at 24a-71a. It rejected all the zoning decision challenges on the ground that Petitioners lacked standing to assert such claims. It rejected all of Petitioners' remaining claims because those claims had already been decided against Petitioners on various grounds in the SEQRA Lawsuit. *Id.*

The single exception was that, when the State Court reached the SEQRA findings re-vote issue, it found that the Town Board's change in vote with respect to adoption of the SEQRA findings for the Project (*i.e.*, voting not to adopt the findings on June 6, 2006 and then voting to adopt the findings on July 25, 2006) was improper because the SEQRA findings were adopted "absent an explanation in the SEQRA

Resolution for the adoption (as opposed to the prior denial), and without any discussion on the record prior to said adoption." *See* Appendix at 56a. The State Court remanded the matter to the Town for "proper action" to address this issue. *Id.*

I. Site Plan Appeal In State Court

In a separate judicial proceeding, Petitioners also challenged the Planning Board's issuance of the site plan approval for the Project ("Site Plan Appeal"). The State Court dismissed this lawsuit, finding Petitioners lacked standing because they did not live close enough to the Project to warrant an inference of injury, because they did not submit any affidavits to show actual injury, because they did not show they were within the "zone of interest" protected by the site plan approval process, and because they failed to demonstrate any injury different from the public at large. *See* Appendix at 18a-23a.

J. Re-Approval by the Town of the Special Permit and Site Plan

The Town and Caithness ultimately appealed from the State Court's determination on the special permit approval to the Appellate Division, and prevailed (discussed below). Nevertheless, while that appeal was pending, the Town also acted on the remand. On June 5, 2007, the Town Board voted to re-adopt SEQRA findings relating to the Caithness Project and to re-approve the special permit and waivers/variances ("June 2007 Resolution"). The June 2007 Resolution to adopt the SEQRA findings

included an explicit explanation for the change in vote between June 6, 2006 and July 25, 2006:

> . . certain of the Town Board councilmembers, as of June, 2006, had not fully and completely reviewed the substantial record in this matter and therefore were not prepared at that time to adopt the Findings Statement, but instead wished to, and actually did, further examine the voluminous information and documents contained in the record (including the extensive two-volume FEIS) concerning the project in order to fully understand the proposal, including without limitation the project's scope, purpose and technology, its potential environmental impacts and the independent environmental review process regarding the pipeline that will supply natural gas to the project, and now, having fully reviewed the record, are prepared to adopt the Findings Statement. . .

RR 354-55. Based on this June 2007 Resolution, the Town Board re-issued the special permit to Caithness. RR 360-71.

K. The Re-Issuance Appeal In State Court

Even though the June 2007 Resolution included an explicit explanation of why there was a re-vote on the SEQRA findings statement, Petitioners filed yet another lawsuit to challenge the

re-approvals, re-asserting several previously rejected claims and arguing, contrary to well-settled state law, that the Town Board could not re-vote on the SEQRA findings resolution in the absence of a Project change ("Re-issuance Appeal"). The State Court denied this challenge by the Petitioners in all respects. *See* Appendix at 72a-93a. The State Court explained:

> In rendering this decision, this Court will defer to the explanation of Respondents-Defendants BROOKHAVEN for reaching a different result, sustaining its determination because a rational explanation for reaching the different result was provided. As noted above, New York courts accord great deference to the explanations offered by boards for their contrary determinations under similar circumstances, and this Court finds that Respondents-Defendants have adequately met that standard.

See Appendix at 87a.

L. The Appellate Orders Rejecting Petitioners' Claims

Petitioners appealed all the decisions of the State Court to the Appellate Division. It lost all the appeals.

In reviewing the State Court's decision in the Special Permit Appeal, the Appellate Division found that "the Town Board conducted an adequate and appropriate environmental review" and that the Petitioners "are foreclosed by the doctrines of *res judicata* and collateral estoppel from claiming that the SEQRA review conducted by LIPA was inadequate since those claims were litigated or could have been litigated in the [SEQRA Lawsuit]." *See East End Prop. Co. #1 LLC v. Town Bd of Brookhaven*, 868 N.Y.S.2d 264 (App. Div. 2008). The Appellate Division also found that the State Court:

> properly determined that the petitioners lacked standing to assert their claims challenging the Town Board's approval of the special permit, waiver, and area variances. The petitioners may not avail themselves of the presumption of injury in fact since they have not demonstrated that their properties lie in close proximity to the project [citations omitted], and they have otherwise failed to demonstrate that they will suffer any injury which is "in some way different from that of the public at large. [citations omitted]."

See Appendix at 10a.

Regarding the SEQRA revote issue, the Appellate Division decided that the lower court was

wrong in remanding the matter back to the Town Board for further explanation. It stated as follows:

> The Supreme Court, however, improperly granted those branches of the petition . . . which alleged that the Town Board acted in an arbitrary and capricious manner by failing to articulate a reason why it passed the resolution approving the SEQRA findings statement after the resolution had been previously rejected. Following the meeting of June 6, 2006, at which the Town Board failed to adopt the resolution, the applications for the proposed land-use approvals were held in abeyance and remained on the Town Board's meeting agenda as "pending decisions" until July 25, 2006. Further, as the Town Board correctly argues, neither SEQRA nor its implementing regulations contain any provision prohibiting the Town Board from reconsidering its own unchanged SEQRA findings statement. Rather, SEQRA only requires that an involved agency such as the Town Board make its own written findings statement before approving a project subject to an FEIS (see 6 NYCRR 617.2[p], 617.11[c]). Contrary to the petitioners' contention, 6 NYCRR 617.11(a) does not preclude a revote under the

> circumstances presented here since the Town Board did not vote to amend its finding statements but, rather, revoted on a resolution to adopt its own unchanged SEQRA findings statement. Accordingly, the petitioners' contention that the Town Board lacked the authority and jurisdiction to conduct the revote is without merit. Moreover, the Town Board's determination to adopt, rather than reject, the resolution to approve the SEQRA findings statement was neither arbitrary nor capricious, but was based on reasons readily apparent on the face of the record.

See Appendix at 8a-9a.

In reviewing the State Court's decision in the Site Plan Appeal, the Appellate Division affirmed the lower court's decision, finding that the lower court properly concluded that the Petitioners lacked standing to commence the proceeding. *See East End Prop. Co. #1 LLC, et al. v. Planning Bd. of Town of Brookhaven*, 867 N.Y.S.2d 685 (App. Div. 2008).

In reviewing the State Court's decision in the Re-issuance Appeal, the Appellate Division dismissed the Re-issuance Appeal because its decision in the Special Permit Appeal rendered it academic. *See East End Prop. Co. #1 LLC v. Town Bd. of Town of Brookhaven*, 867 N.Y.S.2d 686 (App. Div. 2008).

M. Denial Of Further Review By The New York Court Of Appeals

On May 6, 2008, Petitioners asked the New York Court of Appeals for permission to further appeal from the Orders. They raised numerous issues, but they did not raise any federal or constitutional issue. The New York Court of Appeals denied this application on February 24, 2009. *See* Appendix at 1a-2a.

PETITIONERS' MISSTATEMENTS OF FACT

The Petition is replete with deliberate factual misstatements, among them the following:

- Petitioners characterize the payments which Caithness agreed to make in this case as a "payoff" (*see* Petition at 11), as "bribery or something close to it" (*see* Petition at 17), as the "purchase of otherwise unauthorized development rights" (*see* Petition at 5), as a "plot apparently instituted by. . . Caithness" (*see* Petition at 6), and by other similar pejorative terms. This is truly scandalous and outrageous. As discussed above, the Community Benefits Package consisted entirely of PILOTs to the Town and of payments toward community programs in the vicinity of the Project. The Community Benefits Package was publicly discussed, was publicly approved and was reviewed by other public agencies outside of the Town, including the New York State Comptroller and Attorney General. The Community Benefits Package is authorized under state law and the Petitioners chose not to directly challenge the state's approval of it.

- Petitioners assert that the permits issued to Caithness by the Town exceeded the local zoning requirements (*see* Petition at 3) and that these municipal approvals were unauthorized and were granted only "in exchange for paying massive sums of money to the favored constituencies of local officials" (*see* Petition at 5). This is untrue. The Town's regulations specifically authorize electric-generating facilities within the Town's L-1 District by special permit issued by the Town Board. *See* Town Code § 85-309. The Town's regulations also

specifically authorized the Town Board in connection with a special permit application to (i) waive or modify any otherwise-applicable zoning requirements if certain criteria are met, or, alternatively, (ii) grant variances from the otherwise-applicable zoning requirements, including height restrictions. *See* Town Code § 85-31. One of the major issues addressed by the Town Board in the public hearings on Caithness' special permit application was whether such a waiver or variance was warranted. After hearing all the testimony and evidence, the Town Board determined that the Caithness met the standards for both. JR 4043-4053. There is no basis at all for Petitioners' contention that the Town in any way exceeded its authority in granting the zoning approvals which it issued for the Project.

- Petitioners claim that Caithness has a "structural volume some three times greater than local zoning permits." *See* Petition at 3. This is false. The Town has no such requirement. To the contrary, the Project fell well within the Town's lot coverage and floor area ratio requirements.

- Petitioners imply that the Project will have an adverse visual impact on them by pointing out that the FEIS "specifically identified" their community as a "visual receptor" of the Project. *See* Petition at 5, n3. To the contrary, however, the visual analysis in the FEIS showed that Petitioners' community would not be adversely affected at all by the Project due to its distance (*i.e.* in excess of 1/2 mile) and by reason of intervening structures and foliage. JR 1252-1291. The adequacy of the visual

analysis in the FEIS was confirmed in the SEQRA Lawsuit, where no further appeals lie.

- Petitioners state that the Town Board initially voted to deny approval to the Project and then --- allegedly in exchange for an illegal payment of money -- changed its vote and approved the Project. *See* Petition at 4. This, again, is untrue. The Town Board voted only once on whether or not to grant the necessary approvals to the Project --- on July 25, 2006.
- There was no improper "change in vote" by the Town Board on the SEQRA issue. SEQRA requires that, before making a substantive determination on an action such as Caithness's special permit application, a SEQRA findings statement must be adopted. With its vote on June 6, 2006, the Town Board made no substantive determination or finding of any kind with respect to the environmental impacts associated with the Project. It simply voted not to adopt a SEQRA findings statement (either positive or negative) at that time. Nothing in SEQRA required the Town Board to explain why it was voting to adopt SEQRA findings on July 25, 2006 after not doing so on June 6, 2006. In any event, the administrative record clearly indicated the reason for the change in vote, and that reason was entirely rational and legitimate, as confirmed by the Appellate Division. *See* Appendix at 9a; *see also* Point (L), *supra*.

Petitioners rest on speculative assumptions regarding the motivations of individual members of the Town Board, while the record discloses the Town Board's detailed, legitimate reasons for its actions. The Town Board spoke with one voice when it set

forth the reasons why it adopted the SEQRA findings statement on July 25, 2006 rather than June 6, 2006. There exists no proof or evidence whatsoever that this explanation was a sham. Petitioners misleadingly try to create a controversy based on a single statement by one member of the Town Board that was taken out of context.[6]

- Petitioners contend that the Town Board's "change" in the SEQRA vote was conditioned upon the Community Benefits Package. *See* Petition

---

[6] The Town Board member whose integrity and honesty Petitioners have attacked cogently explained, on the record, why he agreed on July 25, 2006 to vote to adopt the SEQRA findings.

> I think without question this has been a very time consuming project as far as the Town Board is concerned. I think it's a very important issue that I for one have taken an awful long time to come to my conclusions. . . . [T]he people from Caithness and LIPA answered each and every question, not only from the community but myself And quite frankly, it took me to that night before I was prepared and comfortable with the environmental concerns that I've had for the past six months or more. I am impressed by the fact that no leading environmentalist has opposed this project. . . . [A]s a result of that and as a result of what other experts have told me that this is an environmentally safe project, and because I've been advised of that, I'm prepared to vote tonight. And my vote is yes.

JR 3996-97. Nevertheless, even if this Board member's vote were discounted, the Town Board's June 2007 Resolution --- which the Appellate Division found to be an adequate and material explanation for the SEQRA re-vote - - would still have had sufficient votes to pass.

at 6. Again, they are simply wrong. In fact, the Town's SEQRA findings statement makes no reference at all to the Community Benefits Package, and never has. JR 4037-42.

POINT I. PETITIONERS NEVER PREVIOUSLY ASSERTED A FEDERAL CLAIM

A. None Of The Factors Warranting A Grant Of Certiorari Is Present In This Case

Rule 10 of the Supreme Court Rules sets forth three grounds which the Court will generally consider in granting certiorari. None of those grounds is present here. The Orders which Petitioners seek to review arose from a state appellate court, not from a United States court of appeals. There is no conflict on an important federal question between the Orders and any decision of a United States court of appeals or another state court of last resort. The Orders do not decide any important federal question. In fact, the Orders were based entirely on state law. *See* Appendix at 3a-23a.

B. Petitioners Did Not Raise A Federal Claim In The State Courts

Petitioners raised no federal claim in their pleadings or briefs in State Court, in the Appellate Division or in the New York Court of Appeals. Nor did any of those courts ever address a federal claim in this case, or base their determinations on a federal ground. This is fatal to a petition for certiorari.

"With very rare exceptions," this Court has "adhered to the rule in reviewing state court judgments . . . that we will not consider a petitioner's federal court claim unless it was either addressed by, or properly presented to, the state court that

rendered the decision we have been asked to review." *Adams v. Robertson*, 520 U.S. 83 (1997) (internal quotation marks and citations omitted); *see also Howell v. Miss.*, 543 U.S. 440 (2005) (explaining that this Court "has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim was 'either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review'") (quoting *Adams*).

There are several purposes underlying this rule. First, "questions not raised below are those on which the record is likely to be inadequate since it certainly was not compiled with those questions in mind." *Id.* at 221 (internal quotation marks and citations omitted). Second, "due regard for the appropriate relationship of this Court to state courts . . . demands that those courts be given an opportunity to consider the constitutionality of the actions of state officials, and equally important, proposed changes in existing remedies for unconstitutional action." *Id.* at 221-22. Finally, such a rule permits a state court "to rest its decision on an adequate and independent state ground." *Id.* at 222.

Petitioners make two arguments in an attempt to show that they allegedly raised a federal issue below. Neither of these arguments withstands scrutiny.

First: Petitioners claim that their petition in the State Court asserted that the Town Board's conduct was "arbitrary" and "ultra vires", and "otherwise unlawful, arbitrary and capricious." *See* Petition at 10. But this does not set forth even a

colorable reference to a constitutional or federal claim. In fact, Petitioner used these words to frame their arguments under state law (*e.g.* the purported violation of New York's Open Meetings Law and the allegation that the Town was imposing an unlawful condition which it had no power to impose under state law). They were never linked to any federal or constitutional claim. This situation is similar to the purported substantive due process claim the Court dismissed in *Cornell v. Green*, 163 U.S. 75 (1896). There, the plaintiff brought an action in state court (later removed to federal court) seeking to set aside a foreclosure on the ground that he was not a party to the proceedings, and that the judgment of foreclosure was not binding on him. The lower court denied his claim, and the plaintiff appealed to this Court, which held that it had no jurisdiction. The Court explained that the Constitution "is not mentioned in the bill of [plaintiff], or in the demurrer of the defendant, or in the decree or the opinion of the court. The case appears to have been treated throughout as depending upon a question of chancery practice, not of constitutional right." *Id.* at 79. As in this case, the "first indication of anything like an intention on the part of the plaintiff to invoke the protection of the constitution of the United States is in the suggestion, in the assignment of errors [to the Supreme Court], 'that said finding deprived said complainant of his property without due process of law.'" *Id.* The Court dismissed the case for want of jurisdiction. The same result is warranted here.

Second: Petitioners further claim that, in a June 12, 2007 legal brief to the State Court, they

quoted a case holding that due process rights were violated by a municipal board's *ex parte* receipt and consideration of material outside the record. *See* Petition at 11. But Petitioners' brief only quoted an unreported case, which in turn quoted a commentator, who gave *his opinion* that the "due process rights" of participants of zoning board hearings would be disregarded if evidence were presented to the board without the ability of the hearing participants to rebut it. *Cilla v. Mansi*, No. 3563-02, 2002 WL 1275122 (Sup. Ct. Suffolk County March 5, 2002) (quoting Terry Rice,. *Zoning & Land Use*, 48 Syracuse L. Rev. 1075, 1106 (1998)). Unlike the commentator, however, the court used more limited language, stating that "[w]here evidence has been received under circumstances which would deny a party the opportunity to appraise or rebut it, the courts have expressed disapproval of the practice." The court never mentioned any state or federal constitutional violation at all. 2002 WL 1275122, at *5 (emphasis added).[7]

Moreover, to the extent a passing reference to this case could suffice to raise a "due process claim," the claim would be a *procedural* due process claim (since it would go to the fairness of the hearing that took place before the zoning board), not the

---

[7] Petitioners' brief cited this unreported case in support of their argument that Cauthiness and the Town had violated New York's Open Meetings Law. But Petitioners abandoned this argument when they went to the Appellate Division and the New York Court of Appeals, and they cannot resuscitate it now before this Court. *See, e.g., Sochor v. Fla.*, 504 U.S. 527 (1992) (holding that the Supreme Court had no jurisdiction to review a constitutional claim that was "not preserved for appeal" in state court).

substantive due process claim that petitioners now raise for the first time. *See, e.g.*, *Daniels v. Williams*, 474 U.S. 327 (1986) (Stevens, J., dissenting) (explaining that *substantive* due process claims apply to "arbitrary government actions regardless of the fairness of the procedures used to implement them," while *procedural* due process claims apply to the state taking an individual's life, liberty or property "without providing appropriate procedural safeguards") (internal quotation marks and citations omitted).

Even if Petitioners had actually made a reference to a constitutional violation (which they did not), the "vague appeal to constitutional principles does not preserve" a constitutional claim, and a "party may not preserve a constitutional challenge by generally invoking the Constitution in state court and awaiting review in this Court to specify the constitutional provision it is relying upon." *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71 (1988) (citing *Taylor v. Illinois*, 484 U.S. 400 (1988) ("A generic reference to the Fourteenth Amendment is not sufficient to preserve a constitutional claim based on an unidentified provision in the Bill of Rights.")).

In *Howell*, 543 U.S. at 443, the Court held that no federal question was preserved. "Petitioner's brief in the State Supreme Court did not properly present his claim as one arising under federal law. . . In the relevant argument, he did not cite the Constitution or even any cases directly construing it, much less any of this Court's cases." *Id.* That is exactly the situation here. The *Howell* Court explained how a federal claim should be preserved in

state court: A "litigant wishing to raise a federal issue can easily indicate the federal law basis for his claim in a state-court petition or brief . . . by citing in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal grounds, or by simply labeling the claim 'federal'." *Id.* at 444 (internal quotation marks and citation omitted). Of course, none of this was done here.

Petitioners cite *Braniff Airways, Inc v. Neb. State Bd. of Equalization & Assessment*, 347 U.S. 590 (1954), to support their contention that they properly raised and preserved a federal question. *See* Petition at 11. *Braniff* involved an airline seeking to have Nebraska's tax assessment statutes declared unconstitutional since Nebraska's tax allegedly imposed a burden on interstate commerce. In *Braniff*, there was no question that the airline had raised a federal constitutional claim. The problem was that the airline had relied on the *wrong* constitutional provision, *i.e.*, the Court explained that the airline should have relied on the Due Process Clause instead of the Commerce Clause. "Though inexplicit, we consider the due process issue within the clear intendment [of the airline's constitutional claims] and hold such issue sufficiently presented." *Id.* at 599. In this case, nothing in the record demonstrated that Petitioners ever presented *any* constitutional or federal claim below. Specifically, in contrast to the constitutional claim which Petitioners now seek to make for their first time, all their prior challenges to the Community Benefits Package were based on state law grounds.

C. Petitioners Did Not Properly Specify Any Federal Claims In The Petition

When a state court judgment is being reviewed, Supreme Court Rule 14(1)(g)(i) requires that a petitioner set forth:

> specification of the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears . . . .

To this end, Rule 14(1)(h)(i)(v) requires Petitioners to include in the appendix to the petition any "material required by subparagraphs 1(f) or 1(g)(i)," and Rule 14(1)(h)(i)(vi) allows Petitioners to include "any other material the petitioner believes essential to understand the petition."

Petitioners have failed to comply with these rules. They did not attach any of the pleadings or briefs they filed in the courts below, even though they contend (inaccurately) that they raised a federal question and preserved it for review in those pleadings and briefs. They have also failed to point to any court opinion below where any federal

question was addressed, which is not surprising given no federal question was ever presented to any court below. Rule 14(4) explicitly states that "[t]he failure of a petitioner to present with accuracy, brevity and clarity whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny a petition."

D. The Orders Were Based On Independent And Adequate State Grounds

It is well-settled that the Supreme Court has no jurisdiction to hear a case if there is an independent and adequate state law ground to support the judgment below. *See, e.g., Fox Film Corp. v. Muller*, 296 U.S. 207 (1935). As discussed above, all the decisions below in the State Court and Appellate Division were based on state law, not federal or constitutional claims. While the Court of Appeals denied leave to appeal without giving an explanation, it is enough that the Court's decision *might* have rested on an independent and adequate state law ground. *Durley v. Mayo*, 351 U.S. 277 (1956).

POINT II. PETITIONERS DID NOT SUFFER A VIOLATION OF SUBSTANTIVE DUE PROCESS

As discussed in Point I above, Petitioners never raised any federal constitutional claim in the courts below, although they now try to argue that they were deprived of substantive due process. However, even if Petitioners had raised such a constitutional claim below (which they did not), it is meritless. A substantive due process claim requires a deprivation of a property interest that is the result of arbitrary and egregious conduct by municipal officials. *See, e.g., City of Cuyahoga Falls, Ohio v. Buckeye Community Hope Found.*, 538 U.S. 188 (2003). Petitioners do not meet this standard.

Petitioners give but short shrift to their alleged property interest. In the last paragraph of the Petition, they assert that their "substantive property interests [are] in their own real estate, and its environment, and [they have] a property interest under New York law as injured-in-fact entities and persons authorized to challenge the municipal resolutions." *See* Petition at 20. To the contrary, however, the lower courts decided that, under applicable state law, Petitioners did not have a sufficient property interest to give them standing to challenge the municipal decisions because their property did not lie in sufficient proximity to the Project to warrant a presumption of injury, because they did not submit any proof showing actual injury, and because they suffered no injury different from other members of the public. JR 16. Additionally, the lower courts also decided that an adequate

environmental review had been done and that there was no adverse effect to Petitioners' "environment". JR 4082-83.

Moreover, not all property rights derived from state law are protected by substantive due process (as opposed to procedural due process). *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985) (Powell, J., concurring) ("Even if one assumes the existence of a property right, however, not every such right is entitled to the protection of substantive due process. While property interests are protected by procedural due process even though the interest is derived from state law rather than the Constitution, . . . *substantive due process rights are created only by the Constitution.*") (emphasis added).

Applying this reasoning, the lower federal courts have held that state-created property rights alone cannot serve as the basis for a substantive due process claim. *Greenbriar Vill., L.L.C. v. Mountain Brook City*, 345 F.3d 1258 (11th Cir. 2003) (holding that a substantive due process claim cannot be based on a "state-granted and-defined property right"); *Kauth v. Hartford Ins. Co. of Ill.*, 852 F.2d 951 (7th Cir. 1988) (holding that where a plaintiff alleges a substantive due process claim based "on a state-created property interest, without alleging a violation of some other substantive constitutional right or that the available state remedies are inadequate, the plaintiff has not stated a substantive due process claim"). The Court has "always been reluctant to expand the concept of substantive due process." *Washington v. Glucksberg*, 521 U.S. 702 (1997), and, respectfully, should not do so here.

Petitioners are effectively asserting that they have a property interest in the proper application of zoning laws against a third party, *i.e.* Caithness. But this Court has never held that a substantive due process right arises based upon the application or enforcement of a zoning law against a third party. Not only has this Court failed to establish such a right, the Second Circuit has explicitly rejected such a claim. Since a town board has broad discretion under New York law in granting permits, site plans and variances, the Second Circuit has held that "[n]o due process right is implicated here because the [plaintiffs] have no right to demand that the Municipal Defendants enforce the zoning laws," and a grant of a special permit, site plan or variance "did not infringe upon any protected property interest of the [plaintiffs]." *Gagliardi v. Vill. Of Pawling*, 18 F.3d 188 (2d Cir. 1994).

Not one of the cases cited in the Petition holds that the imposition of a zoning approval condition relating to the timing of agreements concerning an openly-discussed Community Benefits Package rises to the level of a constitutional violation. Instead, Petitioners cite a few New Jersey cases invalidating approvals that were bargained for in exchange for payments as invalid and arbitrary under New Jersey law. But the Supreme Court has held that "only the most egregious official conduct can be said to be 'arbitrary' in the constitutional sense." *City of Cuyahoga Falls*, 538 U.S. at 198 (internal quotation marks and citations omitted) (emphasis added). The Supreme Court has described this as an abuse of

power that "shocks the conscience." *County of Sacramento v. Lewis*, 523 U.S. 833 (1998).[8]

It is well-settled that this Court's "role is not and should not be to sit as a zoning board of appeals." *Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting). Indeed, the lower federal courts have consistently recognized that "the due process clause may not ordinarily be used to involve federal courts in the rights and wrongs of local planning boards." *United Artists Theatre Circuit, Inc. v. Township of Warrington, Pa.*, 316 F.3d 392 (3d Cir. 2003) (internal quotation marks and citation omitted). Moreover, "every appeal . . . from an adverse ruling of the local planning board involves some claim of abuse of legal authority, but it is not enough simply to give these state law claims constitutional labels such as 'due process' or 'equal protection' in order to raise a substantial federal question . . . . Land-use decisions are matters of local concern, and such disputes should not be transformed into substantial due process claims based only on allegations that government officials acted with 'improper' motives." *Id.* at 402 (internal quotation marks and citation omitted). "Arbitrary conduct that might violate zoning regulations as a matter of state law is not sufficient to demonstrate conduct so outrageously arbitrary as to constitute a gross abuse of government authority that will offend the substantive component of the due process clause." *Natale v. Town of Ridgefield*, 170 F.3d 258 (2d Cir.

---

[8] All of the state cases cited by Petitioners involve alleged violations of *state* law, and none of them even alluded to the United States Constitution. *See* Petition at 12-15 (citing cases).

1999) (emphasis added) (citing cases). Rather, substantive due process "is an outer limit on the legitimacy of government action. It does not forbid governmental actions that might fairly be deemed arbitrary or capricious and for that reason correctable in a state court lawsuit seeking review of administrative action. Substantive due process standards are violated only by conduct that is so outrageously arbitrary as to constitute a gross abuse of government authority." *Id.* No such conduct occurred here.

Petitioners' proposal that this Court effectively constitutionalize zoning board decisions "would take the development of rules and procedures in this area out of the hands of legislatures and state courts shaping policy in a focused manner and turn it over to federal courts applying the broad parameters of the Due Process Clause. There is no reason to constitutionalize the issue this way." *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, No. 08-6, 2009 WL 1685601 (U.S. June 18, 2009).

POINT III. PETITIONERS LACK STANDING

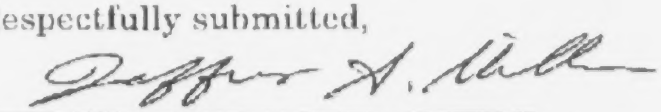
The Court has an obligation to assure itself of a litigant's standing to bring a claim under Article III of the Constitution. *Daimler Chrysler Corp. v. Cuno*, 547 U.S. 332 (2006). "To do so, a plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Id.* at 341 (internal quotation marks and citation omitted). This is a "threshold question in every federal case." *Ross v. Bank of Am., N.A.*, 524 F.3d 217 (2d Cir. 2008). Here, Petitioners have no injury-in-fact. To the extent Petitioners allege an injury to their property, the State Court has determined that Petitioners did not live close enough to the Project to warrant an inference of injury, did not submit any affidavits to show actual injury, and failed to demonstrate any injury different from the public at large. To the extent Petitioners allege an environmental injury, the New York Court of Appeals in the SEQRA Lawsuit has upheld LIPA's conclusion that the Project will not result in any significant adverse environmental impact. Accordingly, Petitioners lack Article III standing.

CONCLUSION

Rule 10 of this Court states that a "petition for a writ of certiorari will be granted only for compelling reasons". No such reason has been shown here. It is therefore respectfully requested that this Court deny the petition for certiorari.

Dated: June 25, 2009

Respectfully submitted,

By 

Jeffrey A. Miller (Counsel of Record)
Richard Gabriele
Michael J. Gelfand
WESTERMAN BALL EDERER
MILLER & SHARFSTEIN, LLP
170 Old Country Road, 4th Floor
Mineola, New York 11501
(516) 622-9200

Attorneys for Respondent Caithness Long Island, LLC

Stephen L. Gordon
Michael Murphy
Beveridge & Diamond, P.C.
477 Madison Avenue 15th Floor
New York, NY 10022

Co-Counsel for Respondent Caithness Long Island, LLC

No. 08-1464

Supreme Court, U.S.
AUG 25 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

EAST END PROPERTY COMPANY #1 LLC, MARK KASPIEV, JOHN MCCONNELL, JOHAN MCCONNELL, DONALD SEUBERT, PATRICIA SEUBERT, FRANCESCA HURLEY, MICHAEL HURLEY, LAURENCE EINUIS, EMILY KARLOVITS, STEPHEN HENRY, THE YAPHANK TAXPAYERS AND CIVIC, ASSOCIATION INC., and the SOUTH YAPHANK CIVIC ASSOCIATION, *et al.*,

Petitioners,

—v.—

TOWN BOARD OF THE TOWN OF BROOKHAVEN, THE TOWN OF BROOKHAVEN, and CAITHNESS LONG ISLAND, LLC, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

RONALD J. ROSENBERG
ROBERT M. CALICA
Counsel of Record
EDWARD M. ROSS
JUDAH SERFATY
ROSENBERG CALICA & BIRNEY LLP
100 Garden City Plaza, Suite 408
Garden City, New York 11530
(516) 747-7400

Attorneys for Petitioners

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI 1

APPENDIX 1

Newsday Article dated August 19, 2009 "Groups will get Caithness cash" 1a

APPENDIX 2

Letter from Robert M. Calica, Esq. to Hon. Pamela J. Betheil, Clerk Town of Brookhaven, dated August 20, 2009 ..... 2a

TABLE OF AUTHORITIES

Cases: PAGE

Caperton v. A.T. Massey Coal Co., Inc.,
___ U.S. ___, 129 S.Ct. 2252
(dec. June 8, 2009)..... 1-2, 3

Statutes:

Fed. R. Evid. 201..... 2

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

This Supplemental Brief is respectfully submitted pursuant to Rule 15 of the Rules of the Supreme Court on behalf of Petitioners East End Property Company #1, LLC, et al. ("East End"), whose Petition for a Writ of Certiorari is currently pending before the Court. This brief requests that the Supreme Court judicially notice related, public proceedings of record which recently occurred, and are currently occurring before the Town Board of the Town of Brookhaven, one of the respondents in this case, as "*other intervening matter not available at the time of the party's last filing.*"

The central claim raised by East End's Petition is that respondent Caithness Long Island LLC ("Caithness"), a national power plant developer, unlawfully obtained approvals from respondent Town of Brookhaven, a suburban Town in New York State, to construct a regional electric power plant in an unlawfully bargained-for exchange with Town Board members over the amount, and allocation of a multi-million dollar Community Benefits Package. Under the Community Benefits Package, millions of dollars were paid by the power plant applicant (Caithness), and then distributed to various public constituencies (local civic organizations, community centers, local school organizations and districts, etc.) favored by the Town Board members who voted upon the power plant approvals. The Petition asserts claims of substantive due process, and procedural due process violations, alleging that the approval process was unlawfully corrupted by the massive financial inducements paid by Caithness, the applicant (*see Caperton v. A.T. Massey Coal Co. Inc.*, ___ U.S. ___,

129 S.Ct. 2252), in exchange for required environmental and zoning approvals ultimately granted by the Town Board (which initially voted to *deny* a required environmental approval, but which then revoted and granted approval *after* the amount of the financial inducement was increased).[1]

We now respectfully request that the Court judicially notice (FED. R. EVID. 201) continuing public proceedings of record occurring before the Brookhaven Town Board relating to the Caithness Plant and the allocation of the Community Benefits Package to local community organizations. Specifically, the Town Board recently resolved to distribute "*the remaining $4,000,000 in grant money the Town is set to receive from the Caithness Long Island Power Plant*" (*see* Supplemental Appendix 1, Article appearing in *Newsday*, "**Groups will get Caithness cash,**" on August 19, 2009), reporting on proceedings before the Brookhaven Town Board.[2]

In relevant part, the *Newsday* article reports that "*Town Board members squabbled in recent weeks*

---

[1] One Town Board Member conceded, on the *record*, that "*they [Caithness and LIPA] came to me and indicated to me what they were prepared to add to the [benefits] package because of my unhappiness*," and that in response, he cynically bargained with Caithness to obtain "*more benefits . . . com[ing] to my district*" before *changing* his vote from one of *disapproval* on the first vote, to one of *approval* on the second (JR. 3516-3519). He was subsequently quoted in a local newspaper boasting to his constituents that "***I did not consider voting for Caithness until I got $1 million for Medford*** *[an area in his district]*."

[2] We have requested the actual Minutes of proceedings before the Town Board, and will provide them in lieu of the *Newsday* article as soon as a properly certified copy of the Minutes is available (Supplemental Appendix 2).

over how the money—which is set aside for groups in the Community around the plant—should be allocated" and states:

> "[Councilmember Connie] Kepert proposed to *split responsibility for distributing money between the three Town Board members who represent areas around Caithness [the plant]* —herself [Councilmember Tim] Mazzei, and councilman Keith Romain.
>
> * * *
>
> 'I didn't think it would be this difficult to give away 5 million dollars' she [Councilmember Connie Kepert] said."

All of the respondents have argued in their respective briefs in opposition to the Petition that the multi-million dollar Community Benefits Package, doled out among various community groups, did not impact the voting councilmembers' decision to approve or not approve the Caithness plant in contravention of *Caperton v. A.T. Massey Coal Co., Inc., supra*, or could otherwise be justified in retrospect and re-characterized (also in retrospect) as a type of PILOT (payment-in-lieu-of-taxes).

Accordingly, we now respectfully request that the Court judicially notice the continuing public proceedings of record occurring before the Brookhaven Town Board relating to the actual doling out of the money, so that the Court may discern (a) how the corrupt and corrupting monetary inducement was, in fact, the *sine qua non* for the approval of the Caithness Power Plant, and (b) that the doling out of such money cannot remotely be justified as a legitimate or bona fide PILOT (payment-in-lieu-of-taxes), particularly where, as here, the large monetary pay-

ment does not remotely qualify as a legitimate PILOT under governing law (*see* Br. in Supp. of Cert. Pet. at 11-17; *see also* Reply Br. in Supp. of Cert. Pet. at 2-3), and the public proceedings over doling out the money to various community groups flatly dispels any conceivable and revisionist notion that the multi-million dollar inducement for approval of the massive Power Plant was earmarked for tax-based expenditures.

Dated: August 24, 2009

RONALD J. ROSENBERG
ROBERT M. CALICA
Counsel of Record
EDWARD M. ROSS
JUDAH SERFATY
ROSENBERG CALICA & BIRNEY LLP
100 Garden City Plaza, Suite 408
Garden City, New York 11530
(516) 747-7400

Attorneys for Petitioners

APPENDIX 1

Newsday Article, Wednesday, August 19, 2009

BROOKHAVEN

Groups will get Caithness cash

Brookhaven officials have put aside their differences and crafted a plan to give community groups the remaining $4 million in grant money the town is set to receive from the Caithness Long Island power plant.

The money comes from Caithness and Long Island Power Authority as part of a $5-million "community benefits package" to the town. Town board members squabbled in recent weeks over how the money — which is set aside for groups in communities around the plant — should be allocated.

A standoff occurred after the town board approved about $330,000 for Lighthouse Mission, a Patchogue charity, and the North Patchogue Fire Department without first getting recommendations from the Caithness Advisory Committee, a citizens group. Councilwoman Connie Kepert said the allocations "circumvented" the citizens group; Councilman Tim Mazzei said the organizations needed the money to operate.

Kepert proposed to split responsibility for distributing the money between the three town board members who represent areas around Caithness — herself, Mazzei and Councilman Keith Romaine.

But Kepert and Mazzei said they have agreed to let the advisory committee make recommendations before the town makes any future grants, and Kepert's legislation has been scrapped.

"I didn't think it would be this difficult to give away give 5 million dollars," she said.

– PATRICK WHITTLE

APPENDIX 2

[LETTERHEAD OF ROSENBERG, CALICA & BIRNEY LLP]

August 20, 2009

VIA FACSIMILE 631-451-9264
AND FEDERAL EXPRESS

Hon. Pamela J. Betheil, Clerk
Town of Brookhaven
Office of the Town Clerk
One Independence Hill
Farmingville, NY 11738

Re: Town Board Meetings relating to Caithness Long Island Energy Center and Long Island Power Authority

Dear Ms. Betheil:

We are attorneys for East End Property Company #1, LLC, and others in connection with certain litigation involving the Town Board of the Town of Brookhaven ("East End Property Company #1, LLC, et al. v. Town Board of the Town of Brookhaven, Caithness Long Island LLC and the Long Island Power Authority", Supreme Court of the United States Docket No. 08-1464).

In connection with certain pending proceedings before the Supreme Court of the United States, we require copies of Minutes of recent (i.e., within the past 60 days) Town Board meeting relating to the Caithness Long Island Energy Center in Yaphank, New York which is reported in the enclosed Newsday

article August 19, 2009 ***("Brookhaven: Groups will Get Caithness Cash")***.

The Newsday article cites to, and quotes statements made by Councilmembers Connie Kepert, Timothy Mazzei and Keith Romaine, but the date or dates of the Town Board meetings are not otherwise identified.

Consequently, we are requesting copies of the Minutes of all meetings within the past 60 days (both public and work sessions) at which the Caithness Long Island Energy Center, the Long Island Power Authority and the "Community Benefits Package" were the subject of Board discussion).

Please expedite this request. If convenient, please provide me with the name and telephone number of the Official Court Reporter for the Town who may be contacted directly to obtain this information on an expedited basis.

Very truly yours,

/s/ ROBERT M. CALICA

Robert M. Calica

RMC:ds
cc: John M. Denby, Esq. (via e-mail)
Devitt Spellman Barrett LLP
Jeffrey A. Miller, Esq. (via e-mail)
Westerman Ball Ederer Miller & Sharfstein, LLP
Stephen L. Gordon, Esq. (via e-mail)
Beveridge & Diamond, P.C.
Christine Fazio, Esq. (via e-mail)
Carter Ledyard & Milburn LLP

Supreme Court, U.S.
FILED
JUL 23 2009
OFFICE OF THE CLERK

No. : 08-1464

In the

Supreme Court of the United States

EAST END PROPERTY COMPANY #1 LLC, MARK KASPIEV, JOHN McCONNELL, JOHAN McCONNELL, DONALD SEUBERT, PATRICIA SEUBERT, FRANCESCA HURLEY, MICHAEL HURLEY, LAURENCE EINUIS, EMILY KARLOVITS, STEPHEN HENRY, THE YAPHANK TAXPAYERS AND CIVIC ASSOCIATION, INC. and the SOUTH YAPHANK CIVIC ASSOCIATION, et al.,

Petitioners,

v.

TOWN BOARD OF THE TOWN OF BROOKHAVEN, THE TOWN OF BROOKHAVEN, and CAITHNESS LONG ISLAND, LLC, et al.,

Respondents.

SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

WESTERMAN BALL EDERER MILLER & SHARFSTEIN, LLP
Attorneys for Respondent Caithness Long Island, LLC
170 Old Country Road, 4th Floor
Mineola, New York 11501
(516) 622-9200

BEVERIDGE & DIAMOND, P.C.
Co-Counsel for Respondent Caithness Long Island, LLC
477 Madison Avenue, 15th Floor
New York, New York 10022

July 2009

DICK BAILEY SERVICE (212) 608-7666 (718) 522-4363 (516) 222-2470 (914) 682-0848 Fax (718) 522-4024
1-800-531-2028

TABLE OF CONTENTS

Page

INTRODUCTION 1

A. Petitioners Never Made Any Motion Or Request That Any Town Board Member Recuse Him Or Herself From Hearing Caithness's Application 1

B. Even If Petitioners Had Made A Motion For Recusal, There Was No Due Process Violation Under *Caperton* 2

C. Petitioners Waived Any Argument That The Failure Of Any Town Board Member To Recuse Him Or Herself Violated Due Process By Failing To Assert Any Such Argument Below Or In Their Petition For Certiorari 5

CONCLUSION 7

TABLE OF AUTHORITIES

Cases *Page (s)*

Caperton v. A.T. Massey Coal Co., Inc.,
556 U.S. ____, 129 S. Ct. 2252 (2009) ..... *Passim*

County of Sacramento v. Lewis,
523 U.S. 833 (1998) 4

Day v. McDonough,
547 U.S. 198 (2006) 5

FTC v. Cement Institute,
333 U.S. 683 (1948) 2

Marek v. State,
No. SC09-1080, 2009 WL 2045416
(Fla. July 16, 2009) 3

McCormick v. U.S.,
500 U.S. 257 (1991) 4

State v. Quezada-Meza,
No. 1 CA-CR 107-1065, 2009 WL 1900441
(Ariz. App. Div. 1 July 2, 2009) 2

U.S. v. Basciano,
7/6/2009 NYLJ 26, (col. 3) (E.D.N.Y.)
(Garaufis, J.) 6

Withrow v. Larkin,
421 U.S. 35 (1975) 6

INTRODUCTION[1]

On July 8, 2009, petitioners submitted a reply brief in support of their petition for a writ of certiorari. Respondent Caithness Long Island LLC ("Caithness") respectfully submits that most of that reply brief is unauthorized under Court Rule 15 because, rather than addressing "new matters" raised in the opposition briefs, petitioners simply rehashed issues that were already extensively discussed in the initial petition for certiorari. However, in their reply brief, petitioners also contend that the judgments below should be reversed or remitted for consideration in light of this Court's recent decision in *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. ____, 129 S. Ct. 2252 (2009). To the extent Rule 15(8) allows parties to submit supplemental briefs to address cases decided while a petition is pending, Caithness submits this supplemental brief for the limited purpose of addressing that case.

A. Petitioners Never Made Any Motion Or Request That Any Town Board Member Recuse Him Or Herself From Hearing Caithness's Application

Petitioners contend that they suffered a due process violation analogous to the facts in *Caperton*. Pet. Reply Br. at 5. They did not. In *Caperton*, this Court held that it was a due process violation for a

---

[1] Terms of reference and abbreviation used herein have the same meaning as in Caithness' main brief in opposition to the petition.

judge who received millions of dollars in campaign contributions from one of the parties to a case before him *to deny a motion to recuse himself* from the panel of judges hearing that party's case on appeal. *Caperton*, 129 S. Ct. at 2257 (holding that "in all the circumstances of this case, due process *requires recusal*") (emphasis added). Unlike the plaintiff in *Caperton*, petitioners here never made any motion or application for recusal, nor any request of any kind that any of the Town Board members recuse themselves from consideration of Caithness's application for a special use permit. Moreover, petitioners have never argued at any level (and indeed have not even argued in their submissions to this Court) that any Town Board member had any obligation to recuse him or herself at any point. For that reason alone, *Caperton* is clearly inapplicable to this case.

B. Even If Petitioners Had Made A Motion For Recusal, There Was No Due Process Violation Under *Caperton*

Even if this Court overlooks the fact that petitioners never made any motion for recusal, there was still no due process violation. Indeed, this Court recognized in *Caperton* that "'most matters relating to judicial disqualification *[do] not rise to a constitutional level.*'" *Caperton*, 129 S. Ct. at 2259 (quoting *FTC v. Cement Institute*, 333 U.S. 683, 702 (1948)) (emphasis added) (modification in original). *See also State v. Quezada-Meza*, No. 1 CA-CR 07-1065, 2009 WL 1900441, at *3 (Ariz.App. Div. 1 July 2, 2009) ("It is a rare case, however, in which

matters relating to judicial bias rise to a constitutional level.") (citing *Caperton*). Rather, the Constitution is only implicated where the judge's continued participation in the case "'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.'" *Caperton*, 129 S.Ct. at 2263.

Petitioners cannot meet that high standard. They appear to argue (though it is far from clear) that the Community Benefits Package (none of which, of course, was paid to the Town Board members or anybody affiliated with them) "biased" certain members of the Town Board when it voted to approve the SEQRA resolution and the special use permit. Pet. Reply Br. at 6. Even if this were true (which, as set forth exhaustively in Caithness's opposition brief, it is not), that does not amount to a due process violation.

This Court was careful to point out in *Caperton* that "[n]ot every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal." *Id.* at 2263. Rather, this only occurs in an "exceptional case," such as the facts presented in *Caperton*. *Id.* In *Caperton*, there was "a serious risk of actual bias-based on objective and reasonable perceptions-*when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent.*" *Id.* (emphasis added). *See also Marek v. State*, No. SC09-1080, 2009 WL 2045416, at *14 (Fla. July 16, 2009) (explaining that *Caperton* was

"determined on the basis of *extraordinary facts* regarding a litigant's campaign contributions to a state supreme court justice," and did not mandate recusal) (emphasis added).

Caithness had no such "significant" or "disproportionate" influence in placing any individuals on the Town Board or directing any Town Board member's election campaign while its application was pending. On the contrary, all Caithness did was provide for a lawful Community Benefits Package, which consisted primarily of lawful PILOTs (*i.e.* tax payments). *See* Caithness Opp. Br. at 11-12. Petitioners take issue with an increase of $1 million in a $151 million package that went, not to any Town Board members, but to the Town and to local school districts. *Id.* at 11 n.5. This is not at all comparable to the facts in *Caperton*, which, as the Court explained, were "extreme by any measure." *Caperton*, 129 S. Ct. at 2265.

On the contrary, this Court has recognized that "[s]erving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator," including the Town Board members. *McCormick v. U.S.*, 500 U.S. 257, 272 (1991).

Indeed, the Court in *Caperton* reiterated that the conduct of municipalities only violates due process when it "'shocks the conscience.'" *Id.* (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 846-47 (1998)). As set forth in Caithness's opposition brief, that standard was clearly not met here. *See* Caithness Opp. Br. at 36-38.

C. Petitioners Waived Any Argument That The Failure Of Any Town Board Member To Recuse Him Or Herself Violated Due Process By Failing To Assert Any Such Argument Below Or In Their Petition For Certiorari

In any event, petitioners clearly waived any claim that their due process rights were violated by the purported refusal of any allegedly biased Town Board members to recuse themselves. Such a claim was never raised below, nor was it raised in the petition for a writ of certiorari.

Indeed, as set forth in Caithness's opposition brief, petitioners never properly raised *any* federal or constitutional claims in the state court proceedings, which precludes them from raising *any* constitutional claims before this court. *See* Cathness Opp. Br. at 26-31. Nor did petitioners properly specify *any* federal or constitutional claims in their petition for a writ of certiorari. *Id.* at 32-33.

Moreover, the petition for a writ of certiorari *does not even mention* any purported bias on the part of any Town Board members, much less argue that such alleged bias amounted to a due process violation. Nor did the petition argue at any point that any of the Town Board members had a constitutional duty to recuse themselves from the proceedings. It is well-settled that an issue which is not included in the petition for certiorari cannot be considered by the Court. *See* Sup. Ct. R. 14.1(a); *Day v. McDonough*, 547 U.S. 198, 203 n.2 (2006).

Finally, any contention that *Caperton* imposed a "new" constitutional standard for recusal that

could not have been asserted by petitioners before that case was decided is without merit. Indeed, the second paragraph of the *Caperton* decision quoted prior precedent from this Court for the proposition that recusal is required where "'the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'" *Caperton*, 129 S.Ct. at 2257 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). So any contention that *Caperton* announced a "new" constitutional rule or standard is entirely without merit. As one judge recently explained, the only thing "new in Caperton was not the objective standard [for recusal under the Constitution], but the *application* of that standard to the area of judicial elections--something utterly irrelevant" to this case. *U.S. v. Basciano*, 7/6/2009 NYLJ 26, (col. 3) (E.D.N.Y.) (Garaufis, J.) (emphasis added).

CONCLUSION

Rule 10 of this Court states that a "petition for a writ of certiorari will be granted only for compelling reasons". No such reason has been shown here. It is therefore respectfully requested that this Court deny the petition for certiorari.

Dated: July 23, 2009

Respectfully submitted,

By _____

Jeffrey A. Miller (Counsel of Record)
Richard Gabriele
Michael J. Gelfand
WESTERMAN BALL EDERER
MILLER & SHARFSTEIN, LLP
170 Old Country Road, 4th Floor
Mineola, New York 11501
(516) 622-9200

Attorneys for Respondent Caithness Long Island, LLC

Stephen L. Gordon
Michael Murphy
Beveridge & Diamond, P.C.
477 Madison Avenue 15th Floor
New York, NY 10022

Co-Counsel for Respondent Caithness Long Island, LLC

(5)

No. 08-1464

Supreme Court, U.S.
FILED
JUL 9 - 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

EAST END PROPERTY COMPANY #1 LLC, MARK KASPIEV, JOHN MCCONNELL, JOHAN MCCONNELL, DONALD SEUBERT, PATRICIA SEUBERT, FRANCESCA HURLEY, MICHAEL HURLEY, LAURENCE EINUIS, EMILY KARLOVITS, STEPHEN HENRY, THE YAPHANK TAXPAYERS AND CIVIC, ASSOCIATION INC., and the SOUTH YAPHANK CIVIC ASSOCIATION, *et al.*,

Petitioners,

—v.—

TOWN BOARD OF THE TOWN OF BROOKHAVEN, THE TOWN OF BROOKHAVEN, and CAITHNESS LONG ISLAND, LLC, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

REPLY BRIEF FOR PETITIONERS

RONALD J. ROSENBERG
ROBERT M. CALICA
Counsel of Record
EDWARD M. ROSS
JUDAH SERFATY
ROSENBERG CALICA & BIRNEY LLP
100 Garden City Plaza, Suite 408
Garden City, New York 11530
(516) 747-7400

Attorneys for Petitioners

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES.....	ii
REASONS FOR GRANTING THE PETITION..	1
CONCLUSION	11

TABLE OF AUTHORITIES

Cases: PAGE

Caperton v. A.T. Massey Coal Co., Inc., — U.S. —, 129 S.Ct. 2252 (dec. June 8, 2009) ..... *passim*

Cine SK8, Inc. v. Town of Henrietta, 507 F.3d 778 (2d Cir. 2007) 5

Citizens to Save Minnewaska v. New Paltz Central School District, 95 A.D.2d 532, 468 N.Y.S.2d 920 (3d Dept. 1983) 2, 3

City of Cuyahoga Falls, Ohio v. Buckeye Community Hope Foundation, 538 U.S. 188, 123 S.Ct. 1389 (2003)..... 9

Fleck v. Town of Colden, 16 A.D.3d 1052, 792 N.Y.S.2d 281 (4th Dept. 2005) 1

Gibson v. Berryhill, 411 U.S. 564 (1973) 5

Nunziato v. Planning Bd. of Borough of Edgewater, 225 N.J.Super. 124, 541 A.2d 1105 (N.J.Super. A.D., 1988) 3, 4

Palm Management Corp. v. Goldstein, 29 A.D.3d 801, 815 N.Y.S.2d 670 (2d Dept. 2006)..... 1

Sierra Club v. Morton, 405 U.S. 727 (1972) .. 10

Taliaferro v. Darby Tp. Zoning Bd., 458 F.3d 181 (3d Cir. 2006) 10

Toll Bros., Inc. v. Board of Chosen Freeholders of County of Burlington, 194 N.J. 223, 944 A.2d 1 (N.J., 2008) 3

PAGE

Township of Marlboro v. Planning Bd. of Tp. of Holmdel, 279 N.J.Super. 638, 653 A.2d 1183 (N.J. Super. A.D., 1995) ... 3, 4

Wilkerson v. Johnson, 699 F.2d 325 (6th Cir. 1983) 6

Withrow v. Larkin, 421 U.S. 35 (1975) 5

Statutes:

N.Y. CPLR § 7804[f] 2

N.Y. General Municipal Law § 874 3

U.S. Const. Amend XIV ..... *passim*

Other Authorities:

187 NEW JERSEY LAW JOURNAL 1152, *Smart Bargaining or Illegal Exactions? Developers Seeking Approval Cannot Pay for Things the Statutes Don't Permit* (2007) 3

REASONS FOR GRANTING THE PETITION

The petition for certiorari should be granted, and in light of the intervening (dec. June 8, 2009) and directly controlling ruling of this Court in *Caperton v. A.T. Massey Coal Co., Inc.*, — U.S. —, 129 S.Ct. 2252 (herein "*Massey*"), the judgments below should be reversed or the matter remitted for reconsideration in light of *Massey*. Petitioners were deprived of due process. *Massey* (potential that decisionmaker may have been influenced by substantial monetary inducement violated due process).

Approximately two weeks before *Massey* was decided by the Court, Petitioners on May 22, 2009 petitioned for a writ of certiorari upon their challenge to the *quid pro quo* approvals (and reversal of an initial disapproval vote), made by a local quasi-judicial body which thereupon authorized the construction and operation of a vastly oversized 350 megawatt regional electric generation facility in a local zone where such a use was otherwise prohibited. The Town Board of Respondent Town of Brookhaven, sitting as a Zoning Board of Appeals and subject in New York to procedures and limitations applicable to a quasi-judicial body,[1] voted and re-voted to grant approvals for the plant only after "negotiating" with the applicant over the payment of well over $150 million to the voting officials' favored constituents, causes and community projects. This unseemly and palpably unlawful bargaining over

---

[1] *Fleck v. Town of Colden*, 16 A.D.3d 1052, 792 N.Y.S.2d 281 (4th Dept. 2005) (Town Board deciding variance application acts as Zoning Board of Appeals and is subject to limitation imposed on ZBA); *Palm Management Corp. v. Goldstein*, 29 A.D.3d 801, 815 N.Y.S.2d 670 (2d Dept. 2006) (ZBA is a quasi-judicial administrative agency).

massive sums of monies in direct exchange for governmental approvals occurred in the complete absence of legal authority under New York law, and the monetary inducement was made an *express* written "condition" of the ultimate Special Permit approval (JR 78-83).

At every stage of legal proceedings below, from the *first* pleading, and in *every* brief subsequently filed, including in every appellate court brief submitted by Petitioners, the unfair bias attributable to the *ad hoc* negotiated financial inducement was a prime (and on appeal *the* prime) basis for challenging the resulting approvals and reversal of initial disapproval vote. Even Petitioners' initial pleading below (Joint Record ["JR"] 66-67, with its accompanying and expressly incorporated points of law (N.Y. CPLR 7804[f]), identified the corrupted process and financial negotiations as a due process violation. (Petitioner's June 12, 2007 Memo of Law in Support of Petition, pp. 36-37, quoted at pp. 10-11 of the Petition herein).

As shown in the Petition, New York law does not authorize a local body hearing a special permit, variance, and environmental approval application to allow a monetary payment by the applicant to serve as an inducement to the approval. *Citizens to Save Minnewaska v. New Paltz Central School District*, 95 A.D.2d 532, 468 N.Y.S.2d 920 (3d Dept. 1983) (school district's resolution granting applicant tax exemption conditioned on applicant paying PILOT payment in the event casino gambling were legalized, was *ultra vires*).[2] Such a practice in the zoning

[2] The $150 million to $200 million payment by the applicant herein (JR 78-83) was not, as Respondents assert, solely a payment in lieu of taxes to an industrial development agency (an

approval context, and more egregiously, in a quasi-judicial variance, special permit and environmental review context, and occurring in the complete absence of any authorizing legislation, results in a clear deprivation of due process infusing bias and improper influence into the governmental decision-making process. *Toll Bros., Inc. v. Board of Chosen Freeholders of County of Burlington*, 194 N.J. 223, 944 A.2d 1 (N.J., 2008); *Township of Marlboro v. Planning Bd. of Tp. of Holmdel*, 279 N.J.Super. 638, 653 A.2d 1183 (N.J. Super. A.D., 1995); *Nunziato v. Planning Bd. of Borough of Edgewater*, 225 N.J.Super. 124, 541 A.2d 1105 (N.J.Super. A.D., 1988); *see* 187 NEW JERSEY LAW JOURNAL 1152, *Smart Bargaining or Illegal Exactions? Developers Seeking Approval Cannot Pay for Things the Statutes Don't Permit* (2007); *Citizens to Save Minnewaska v. New Paltz*

"IDA" PILOT agreement). To the contrary, the approval specifically stated that significant portions of the millions of dollars paid were to go to specified civic associations and other favored constituencies (*id.*). Moreover, even the portion identified as being paid to the IDA as a payment in lieu of taxes was not something the Town Board possessed authority to negotiate. New York law allows only an IDA to negotiate and enter a PILOT agreement, not a quasi-judicial zoning board hearing a variance, special permit and environmental application. N.Y. General Municipal Law § 874 (authorizing only *the IDA* to enter into PILOT agreements, not the Town Board; and requiring that the PILOT agreements be made pursuant to "a uniform tax exemption policy" of the IDA, not a Town Board negotiated payment made as an inducement and condition of a special permit approval). In fact, there is absolutely nothing in the Record to indicate that the IDA procedures were even pretextually followed prior to the special permit grant and community benefits package condition here. It was only during the appeals herein that the applicant divulged that an after-the-fact IDA agreement had been reached concerning some portions of the $150-$200 million in payments.

Central School District, *supra*, 95 A.D.2d 532, 468 N.Y.S.2d 920 (3d Dept. 1983).

As New Jersey appellate courts have recognized, an applicant who makes such a large monetary payment as part of the permitting process obviously expects to get something for the payment, in a *quid pro quo* fashion. *Township of Marlboro*, *supra* ("[Such an] illegal exaction constitutes a blatant *quid pro quo* for the approval, either demanded by the municipality and acceded to by the developer or offered by the developer and accepted by the municipality in circumstances in which the exaction is unrelated to any legitimate land use concerns"). The bias brought about by the consideration of the monetary payment in the complete absence of legislative authority, standards and limitations on such unseemly bargaining, amounts to "free-wheeling bidding [which] . . . is *grossly inimical* to the goals of sound land use regulation" and constitutes an "*intolerable spectacle* of a [town] board haggling with an applicant over money [such as to] too strongly suggests that variances are up for sale." *Nunziato*, *supra*.

This Court's recent ruling in *Caperton v. A.T. Massey Coal Co., Inc.*, — U.S. —, 129 S.Ct. 2252 (June 8, 2009), establishes that even in the absence of a "*quid pro quo*" arrangement for a favorable determination in direct exchange for a monetary payment, due process is violated where a judicial officer (in that case a state Supreme Court Judge), renders a decision on a case where there is a likelihood that the monetary payment could cause prejudgment or bias.

Specifically, the *Massey* decision makes clear that a judge (or in this case, quasi-judicial decisionmakers) violates due process by presiding over a case

when the judge or decisionmaker objectively might be biased by a participant's substantial financial influence. The applicable test is whether, "under a realistic appraisal of psychological tendencies and human weakness," the financial interest "poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." Even when there is no actual "quid pro quo," this Court nonetheless held, "We find that [the party]'s significant and disproportionate influence—coupled with the temporal relationship between the [influence] and the pending case—'offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.' " *Id.* (internal citations omitted). This Court further instructed that where, as here, the decisionmaking process is tainted by a participant's financial influence and payments, " 'the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.' " *Massey* (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

The constitutional limitations and permissible bounds of due process addressed by this Court in *Massey* are not limited to judges, but apply with equal force to other decisionmakers, as in the case at bar, which exercise other types of quasi-judicial or administrative functions. *See* n. 1 *supra*; *see generally Massey* (framing the constitutional issue with regard to judges and decisionmakers, and specifically citing to this Court's prior holdings in *Withrow v. Larkin*, *supra* (medical licensing boards) and *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973) (administrative board composed of optometrists)).[3]

---

[3] *Accord Cine SK8, Inc. v. Town of Henrietta*, 507 F.3d 778 (2d Cir. 2007) (zoning decision "tainted with fundamental

The Respondents, in opposing this Petition, as they did in the New York courts below, merely resort to contending that the monetary payment did not bias the voting board members and did not influence them. This is, to say the least, a speculation finding no basis in the record which shows: (1) that the monetary payment was made an express "condition" of the approvals (JR 78-83); (2) the Town Board initially voted *against* the environmental approval and, only *after* the applicant increased the monetary inducement by over one million dollars and one of the board members negotiated with the applicant over specific projects for his District, did that board member change his vote (JR 3514); and (3) the overt statements of the other board members (including its Supervisor, as the presiding member) that they did, in fact, deem the monetary payments to form a part of the decisionmaking process and that they did in fact negotiate with the applicant before rendering the approvals (JR 3514; Appeal No. 3 Record 180-181).

As previously quoted in the Petition herein, Town Board Councilman Timothy Mazzei, the member who changed his vote between June 6th and July 25th, made clear on the record in a Town Board meeting during that period, that he was negotiating the *amount* of the payment with the applicant. His full statement on the record reads:

---

procedural irregularity" gives rise to substantive due process claim); *Wilkerson v. Johnson*, 699 F.2d 325, 328 (6th Cir. 1983) (enforcing due process restrictions and limitations on members of a state barber licensing board, and noting that "[t]he regular and impartial administration of public rules governing [liberty and property] interests, as required by due process, prohibits the subtle distortions or prejudice and bias," even where no class-based or other generalized invidious discrimination motivates the adverse treatment of a particular applicant).

> "*I indicated very early on that one Council person, not six, negotiated this, this benefit package with LIPA [respondent Long Island Power Authority] and Caithness. That bothered me. It still bothers me.* I didn't think it was right. *When it was clear that you didn't have the votes, well, then all of a sudden, they became important because a vote was needed.* They came to me very professionally, very intelligently. I spoke with Ross [Ain] who is an extremely nice man, extremely intelligent man. He has explained everything very well to me. And, that with LIPA representatives, also very professional, very intelligent. And, I indicated to them that I wasn't going [to] negotiate. That was my exact words. *I said I wasn't happy. I felt that more benefits should have come to my district because . . . to do that and I'll listen and I'll take into consideration.'* But, I never said, *'I'm negotiating with you.' I never said, 'I want this, this, and the other thing'. They came to me and said, we're prepared to do additional things to try to satisfy you and I, and I listened to them.*" (JR 3514) [emphasis supplied].

The Town's Supervisor (the Presiding member of the Town Board) also made clear on the record that the Town's approval was directly motivated by obtaining otherwise unavailable funds for popular community projects:

> "*Between the pilot [payment in lieu of taxes] payments between and community benefits package that was very ably negotiated by Councilwoman Kepert, Councilman Mazzei, Councilwoman Walsh and all the Town Board,*

> *we're able to do things with this particular power plant proposal that will enable communities who otherwise would never have been able to meet their public mission, whether it's the Village of Patchogue, the village of Bellport or this township of Brookhaven, whether it's the Boys & Girls Club Of North Bellport, whether it's the South Country School District. The list goes on and on as to how this is going to benefit a whole multitude of peoples, a whole multitude of public organizations. And this is the opportunity that, yes, we seek because it gives us the ability to do things what otherwise would not be done."* (Appeal No. 3 Record 180-181).

The Respondent Caithness' contention that there was no change in vote concerning the environmental approvals,[4] or that the million dollar plus increase

---

[4] Most disturbing, the applicant, Respondent Caithness, falsely states in its brief in opposition to this Petition, at p. 10, that (italics added to false statements):

> The Project appeared on the Town Board's calendar for June 6, 2006. . . . *Two members of the Town Board stated at that time that they needed more time to evaluate the Project. JR 3477-78.* Therefore when the motion on the SEQRA findings resolution was made, the Town Board voted 4 to 3 not to adopt it *at that time.*

The contention is flatly false as a matter of record (Appendix to Petition, 36a; 53a). In fact, the record reference cited for this after-the-fact attempt to pretend that the actual vote against the environmental SEQRA Resolution was not a vote but an adjournment, JR 3477-3478, shows the exact opposite: petitioner herein Donald Suebert spoke in opposition to the application, a call for a vote was taken, no Boardmember even hinted that they were not ready to vote on the merits of the SEQRA Resolution or "needed more time," and the vote was 4 to 3 against it, as the trial court specifically found in its Opinion below (Appendix to Petition, 36a; 53a).

in funds did not influence the Town Board, is clearly contrary to the Record. Even more so, this Court's *Massey* decision makes clear that the inevitable denials that the monetary payment was a *quid pro quo* for the approvals is not the operative consideration. The relevant factors are that the applicant's "significant and disproportionate influence—coupled with the temporal relationship between the [influence] and the pending case—'offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.'" *Massey, supra.*

The Respondents' contentions that Petitioners lack standing or a property interest, or did not argue the same due process points they assert upon this Petition, are equally erroneous. As shown above as well as in the Rule 14(g)(i) Statement in the Petition (p. 10), the corrupting bias of the monetary inducement was the prime issue raised from beginning to end below, and it was identified as constituting a "due process" deprivation, as well as egregiously "arbitrary and capricious" conduct, which is the very definition of a substantive due process violation (JR 66-67, also incorporating June 12, 2007 Memo of Law in Support of Petition, pp. 36-37, quoted at pp. 10-11 of the Petition herein). *City of Cuyahoga Falls, Ohio v. Buckeye Community Hope Foundation*, 538 U.S. 188, 198, 123 S.Ct. 1389, 1396 (2003). In fact, the objection concerning the unlawful corrupting influence of the monetary payment, by its inherent nature, asserted a due process deprivation claim. *City of Cuyahoga Falls, Ohio v. Buckeye Community Hope Foundation*, 538 U.S. 188, 198, 123 S.Ct. 1389, 1396 (2003) (even when "inexplicit, . . . the due process issue [was] within the clear intendment

of such contention and [ ] such issue [was] sufficiently presented").

Petitioners' standing is further undeniable given that they were specifically accorded standing upon their environmental challenge, and their Petition below was initially granted to the limited extent of remanding the matter to the Town Board for an "explanation" for the change in SEQRA vote (Appendix to Petition, 53a-57a).

The Respondents' apparent belief that environmental injury to petitioners' own homes is not cognizable injury in fact under Article III or is not a due process property interest, is soundly mistaken. *Sierra Club v. Morton*, 405 U.S. 727 (1972) ("Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that . . . interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process"); *Taliaferro v. Darby Tp. Zoning Bd.*, 458 F.3d 181, 190 -191 (3d Cir. 2006).

For the reasons stated in the Petition and above, review by this Court is fully warranted, and the judgments should be reversed or the matter remitted for reconsideration in light of *Massey*.

CONCLUSION

It is respectfully requested that this Court grant the Petition for a writ of certiorari.

Dated: July 8, 2009

Respectfully submitted,

RONALD J. ROSENBERG
ROBERT M. CALICA
Counsel of Record
EDWARD M. ROSS
JUDAH SERFATY
ROSENBERG CALICA & BIRNEY LLP
100 Garden City Plaza, Suite 408
Garden City, New York 11530
(516) 747-7400

Attorneys for Petitioners